The International Dimensions of Law

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Preface

The internationalisation und Europeanisation of national law has proceeded apace in recent decades. This development is, however, only rarely mirrored in the curricula of today's law faculties. Whereas national law is taught extensively and in great detail, the understanding of its links to supranational and European law is at times neglected.

This textbook is essentially our suggestion on how students may be introduced to the broader sphere of law beyond national borders. Accordingly, the aim of the book is to help students understand that legal systems do not only exist in their own national context but also within and part of various supranational and European levels. We attempt to provide a clear account of International and European Public and Private Law as it ought to be covered in undergraduate and postgraduate courses. The authors intend the textbook to be used as teaching material in universities and other institutions throughout Europe and elsewhere in order to familiarise future generations with international and European law and to provide an analysis of the impact of supranational legal system and European law on the developments of national law.

The overall structure of this textbook is as follows. After the first chapter, which deals with introductory matters, chapter 2 addresses the various problems arising in conflict of laws and uniform private law; questions of public international law, including its implementation within national systems and the United Nations, are considered in chapter 3; chapter 4 examines questions relating to European law. Consistent with our aim, some topics have been excluded and the coverage is far from comprehensive. Indeed, there are many excellent textbooks on the individual topics covered here; of their rich contents our introduction can do no more than give a teaser.

We are indebted to our colleagues and the students for providing food for thought in various discussions. We wish to express our sincere thanks to two fine colleagues, Marlene Brosch and Donna Stockenhuber, for taking on the task of discussing, proof-reading, indexing and cross-referencing earlier versions of the manuscript. Finally, we would like to

thank our publisher, Jan Sramek, for including this textbook in its third edition in his programme; the cooperation with him and his team was most enjoyable and highly professional.

Graz/Wien, June 2016 *Brigitta Lurger* and *Thomas Thiede*

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Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch, Austrian Civil Code	**A**
ADR	Alternative Dispute Resolution	
AG	Advocate-Generals	
art.	article	
artt.	articles	
betna	best alternative to negotiated agreement	**B**
BGB	Bürgerliches Gesetzbuch, German Civil Code	
BGH	Bundesgerichtshof, German Federal Court of Justice	
BVerfG	Bundesverfassungsgericht, German Constitutional Court	
B-VG	Bundesverfassungsgesetz, Austrian Constitution	
cf.	confer, compare	**C**
CFSP	Common Foreign and Security Policy	
CISG	United Nations Convention on Contracts for the International Sale of Goods	
CJEU	Court of Justice of the European Union	
DCFR	Draft Common Frame of Reference	**D**
DG	Directorate-General	
e.g.	exempli gratia, for example	**E**
EC	European Community	
ECB	European Central Bank	
ECHR	European Convention on Human Rights	
ECJ	European Court of Justice	
ECLI	European Case Law Identifier	
ECOSOC	Economic and Social Council	
ECR	European Court Reports	
ECSC	European Coal and Steel Community	
ECtHR	European Court of Human Rights	
EEA	European Economic Area	

	EEC	European Economic Community
	EFTA	European Free Trade Area
	EP	European Parliament
	EPC	European Political Cooperation
	ESCB	European System of Central Banks
	et seq.	et sequens, and the following
	etc.	et cetera, and so forth
	EU	European Union
	EURATOM	European Atomic Energy Community
G	GC	General Court
H	HR	High Representative of the EU
I	IBA	International Bar Association
	ICC	International Chamber of Commerce
	ICC	International Criminal Court
	ICJ	International Court of Justice
	ICT	International Criminal Tribunal
	ICTR	International Criminal Tribunal of Rwanda
	ICTY	International Criminal Tribunal of Yugoslavia
	idem	the same
	INCOTERMS	International Commercial Terms
	IPRG	Internationales Privatrechtsgesetz, Austrian Act on Private International Law
L	lit.	litera, letter
M	MDG	Millenium Development Goals
	NATO	North Atlantic Treaty Organisation
N	NBW	Nieuwe Burgerlijk Wetboek, Dutch Civil Code
	NGO	non-governmental organisations
	no.	number
O	OECD	Organisation of Economic Cooperation and Development
	OEEC	Organisation of European Economic Cooperation
	OGH	Oberster Gerichtshof, Austrian Supreme Court

OHCHR	Office of the High Commissioner for Human Rights	
OJ	Official Journal	
OR	Obligationenrecht, Swiss Code of Obligations	
OSCE	Organisation of Security and Cooperation in Europe	
para.	paragraph	**P**
PIL	Private International law	
PJCC	Police and Judicial Cooperation in Criminal Matters	
PON	Project on Negotiation	
SCSL	Special Court for Sierra Leone	**S**
TEC	Treaty establishing the European Community	**T**
TEU	Treaty of the European Union	
TFEU	Treaty for the Functioning of the European Union	
UDHR	Universal Declaration of Human Rights	**U**
UK	United Kingdom	
UN	United Nations	
UNAT	United Nations Appeals Tribunal	
UNCITRAL	United Nations Commission on International Trade Law	
UNIDROIT	International Institute for the Unification of Private Law	
UNO	United Nations Organisation	
US	United States	
USA	United States of America	
v.	versus, against	**V**
ZGB	Zivilgesetzbuch, Swiss Civil Code	**Z**
zopa	zone of possible agreements	
ZPO	Zivilprozessordnung, Austrian Code of Civil Procedure	

 Legal Materials

 Note

 Control Question

 Example

Chapter 1

Introduction and Orientation

I. Public international law and private international law

The legal universe can be roughly divided into two spheres: international law and domestic law. International law prescribes rules governing the relations of nation-states (or »states«) and international organisations as well as rules governing the cross-border relations of private persons. It encompasses both public and private international law. Domestic law, on the other hand, prescribes rules governing everything else, primarily the conduct or status of individuals, corporations, and other »private« entities within each state comprising the legal relations among individuals or corporations and the relations between the individuals or corporations and the different state authorities within a state. 1/1

It is important to be clear on terminology: What do we mean by »private« persons or entities? This refers to all natural or legal persons except states. In other words, »state« is regarded as the opposite end of the spectrum to »private«. »Individuals« are natural persons while corporations are legal persons. States are also legal persons, but they are not »private« persons. Private entities are private persons that are neither individuals nor corporations.

Of course, the term »private« can also be used in a different sense: »private« persons acting for private purposes are usually called consumers as distinguished from companies and entrepreneurs who act on a professional basis. However, we will not use the word »private« in this sense here. If we refer to »private« persons in this sense, the term »consumer« will be used.

Public international law must be distinguished from private international law. Public international law primarily governs the activities of state governments in relation to other state governments and the 1/2

activities of international organisations, whereas private international law or »conflict of laws« deals with the cross-border activities of individuals, corporations and other private entities. A large body of private international law consists of choice-of-law rules determining which state's domestic law would apply to a dispute between private individuals who have a significant connection with more than one state, such as an international sales contract between a company in Austria and a company in Germany.

In legal literature you will find both a wider and a narrower usage of the term »private international law« and again we need to agree on the terminology used in this book. In its wider meaning, private international law entails all the rules pertaining to cross-border relations between private individuals, corporations or other private entities including:

- rules on international competence to adjudicate a case specifying which court may adjudicate matters concerning cross-border relations, so-called »adjudicatory jurisdiction«;
- rules on the law applicable to these relations, so-called »choice-of-law rules«;
- rules on recognition and enforcement of foreign judgments within a domestic legal system, and, finally,
- rules on uniform private law.

In the common law you will rarely find the term at all. Here, private international law is usually called »conflict of laws«.

However, in the Germanic terminology, private international law is also used in a narrower sense referring to choice-of-law rules determining the domestic state law applicable to a cross-border private relationship.

In this book the term private international law will be used only in the wider sense and interchangeably with »conflict of laws«.

1/3 Regarding the scope and terminology of private international law, we must be aware that this area of law has expanded significantly in the last decades and encompasses a number of international treaties on many subjects that were traditionally covered by domestic private law only. A good example of such development are the rules on uniform private law established by international treaties, such as the UNCITRAL Convention on the International Sale of Goods (CISG) which we will discuss in this book (see no. 2/102 et seq., below).

1/4 As a result of this development and with regard to content, the dividing line between public and private international law has become blurred as the rules of traditional public international law now also purport to govern private conduct. Originally, treaties under public international law established rights and duties of states towards one another. Today, the main aim of uniform private law treaties – which are, indeed, treaties under international public law – is the creation of private law rules that govern the relations between private individuals and corporations and that fulfil the same function as domestic private law rules – only with the additional advantage for cross-border relations between private individuals that private law rules are now uniform in a number of states. States also frequently conclude treaties granting rights of trade or investment to nationals of other states, proclaiming individual human rights that are required to be protected by the states, or establishing environmental standards to be followed by industrial plants near international borders.

1/5 The line between international law and domestic law, as well as between public law and private law, has also become somewhat artificial especially for practitioners. Indeed, at least to some commentators, the intellectual basis for the traditional conceptual dichotomy of the old legal universe with public international law opposed to private international law; international law opposed to domestic law; and public law opposed to private law seems obsolete. The following introductory chapter on European law (see no. 1/13 et seq., below) includes a number of examples illustrating the difficulty in drawing a dividing line between public international law and private international law on the one hand, and between domestic and international law, on the other hand.

Figure 1: Interrelations of international and domestic, public and private law ▹

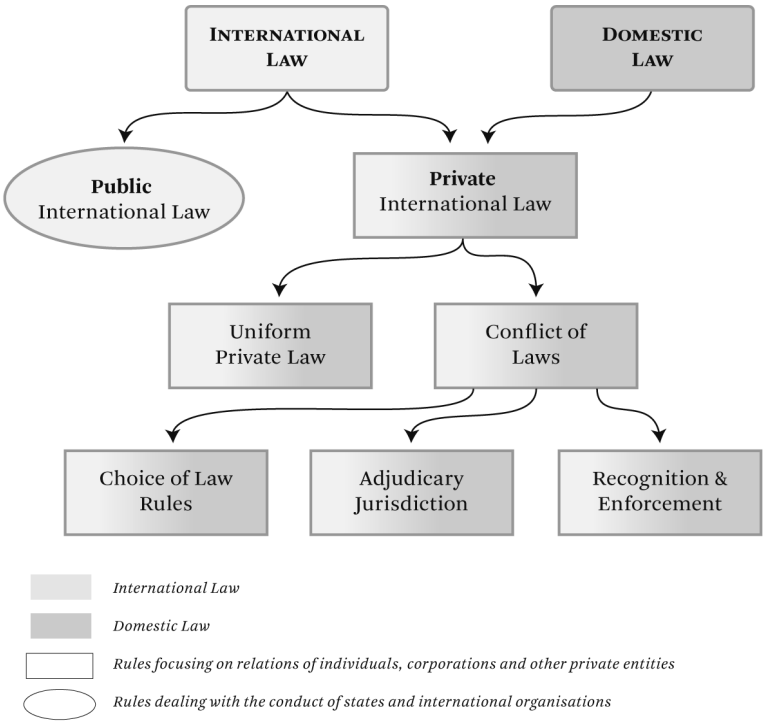

Figure 1: Interrelations of international and domestic, public and private law.

II. Sources of law

1/6 The US-American Restatement of International Law (section 101) defines public international law as follows: »›International law‹ as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organisations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.«

1/7 The main sources of public international law are treaties and customary law. A treaty or convention is understood as an agreement between two (bilateral) or among several (multilateral) states that is reached by the executive branches of the governments (for instance the President) often with the legislative branch's support (for instance the

Parliament). Note that treaties among states often establish international organisations. If the provisions of these treaties so provide, the decisions of organs of international organisations may also be sources of binding public international law. Finally, customary law is not based on an explicit agreement, but on the long-standing observation of a certain, originally non-binding rule by a great number of states.

The main fields of private international law are adjudicatory jurisdiction, choice-of-law (private international law in the narrower sense) and recognition and enforcement. These fields are governed by »domestic« rules of the states – not »domestic« with respect to their content, but »domestic« with respect to their origin –, EU regulations and international treaties. International treaties and European law sources govern the field of uniform private law. 1/8

Public International Law	Private International Law
▹ Treaties (e.g. UN Charter)	▹ Domestic Rules (e.g. IPRG)
▹ Customary Law	▹ EU Regulations
▹ Acts of International Organisations	▹ Treaties (e.g. CISG, Hague Conventions)

Figure 2: Major sources of public and private international law.

III. Enforcement of rights and duties established by public and private international law

What is »private law«? There are two meanings of the English term »private law« which correspond to the Germanic notions of »Privatrecht« and »Zivilrecht«. The narrower meaning of »private law« is the meaning of »Zivilrecht« (or »Bürgerliches Recht«) – »private law« in this sense includes all subjects covered by the »Civil Code«, which is the »ABGB« in Austria, namely the law of contracts and other obligations, property law, family law, and the law of succession. »Private law« in this narrow sense is a sub-branch of the wider notion of »private law«

(»Privatrecht«) which comprises not only »Zivilrecht« but also commercial law, the law of corporations, intellectual property law and individual labor law.

1/9 The main function of private law as well as of private international law is to establish rights and duties of private individuals, corporations or other private entities. These individual rights and duties can be directly enforced by the national court system of the state involved.

Mr. A, a Bosnian national living in Vienna wants to divorce his wife Mrs. A, who is also a Bosnian national living in Vienna. He brings an action in an Austrian court. The Austrian choice-of-law rule laid down in an Austrian federal statute on private international law (IPRG) obliges the Austrian court to apply Bosnian law to the divorce issues. If the Austrian court refuses to apply Bosnian law, but applies Austrian divorce law instead, Mr. A can enforce his right to have Bosnian divorce law applied by filing an appeal with the superior court. This means that Mr. A can rely on the Austrian courts to enforce the choice-of-law rules that determine which law has to be applied to private law issues.

Mr. C is an Italian entrepreneur. He concludes a sales contract with the Austrian manufacturer B, to which uniform private law applies, namely the contract law rules of the UNCITRAL Convention on the International Sale of Goods (CISG) (see no 2/102 et seq., below). The CISG rules give Mr. C the right to demand damages from Mr. B because the goods delivered by Mr. B were defective. How can Mr. C enforce this right to damages? He can bring an action against Mr. B in an Austrian court and demand that the court enforces the right granted to him by the CISG.

1/10 One of the main characteristics of public international law, which distinguishes it from private law and private international law, is the identity of legislators and those subjected to the legislation. In the case of an international treaty, the contracting parties are the legislators and they are thus bound by the rights and duties established by the treaty. The same applies to customary public international law: The customs are established by state practice (legislators) and those subjected to customary rules are again states.

1/11 This identity of legislators and those subject to the law leads to one important weakness of public international law – the key problem of

rule enforcement. Public international law rules can normally not be enforced by state courts and therefore most often cannot be enforced at all. The consequential lack of sanctions leads some commentators to opine that the rules of public international law do not have the character of law at all. As we discussed above, the main content of public international law rules are the rights and duties of states and international organisations and sometimes also the rights of individuals vis-à-vis states or international organisations. For the enforcement of these rules against states or international organisations, an institution superior to the states or international organisations is needed, which is endowed with the power to compel the states or international organisations to comply with their public international law duties. In most cases such superior institutions do not exist. As states are usually not liable to one another due to so-called »state immunity«, the courts of one state are not superior to those of other states. As a result, international courts are necessary and, indeed, some exist. For example, the International Court of Justice in The Hague in the Netherlands which has only a very limited field of competence and cannot enforce all international law. There is also the European Court of Human Rights (ECtHR) in Strasbourg, France, which enforces the European Convention on Human Rights (ECHR) against the signatory states of the Convention. Additionally, specific international courts exist such as the criminal tribunals of Yugoslavia (ICTY) and Rwanda (ICTR), as well as the International Criminal Court (ICC), which only exercise jurisdiction over specific international crimes in particular geographic areas.

International organisations often try to establish new forms of law **1/12**
enforcement, for instance, the United Nations with its Security Council, but they are normally rather ineffective. Another way for states to respond to the breach of duties of public international law is via bilateral or multilateral sanctions. This means that a state or a group of states impose economic or political sanctions on the state violating its public international law duties. Such sanctions were utilised in the Kosovo conflict and are currently in place against Iran and North Korea.

Figure 3: Enforcement of rules (examples). ▹

Public International Law	Private International Law
▹ International Court of Justice (ICJ) ▹ European Court of Human Rights (ECtHR) ▹ International Criminal Court (ICC); International Criminal Tribunal for the former Yugoslavia and Rwanda (ICTY, ICTR) ▹ Security Council	▹ National Court System

Figure 3: Enforcement of rules (examples).

As an initial exercise, consider whether the norms established by the legal instruments described below would qualify as public or private international law or as domestic law in terms of the definitions outlined above.

You should focus on the norm or rule established by each of the instruments, rather than on the instrument itself. It is not the origin of the instrument that is important but rather its content. To which institution would you have to turn to enforce rights or duties established by the respective instrument?

?

A treaty between Germany and Poland establishing the boundary between the two countries.

An agreement between Mitsubishi Industries Ltd., a Japanese corporation, and General Motors Inc., a US corporation, for the purchase and sale of 200.000 cars to be manufactured by Mitsubishi in South Korea. Does it make a difference if the agreement does or does not include a clause selecting a particular body of law, for instance Delaware law, to govern the validity and construction of the agreement?

An Austrian statute imposing a tax on foreign corporations.

A treaty between Austria and all other Member States of the European Union that determines which (domestic) state law has to be applied to controversies concerning cross-border contracts.

A treaty between Austria and 50 other states that establishes uniform contract law rules for cross-border sales contracts.

A rule of the Austrian Constitution (art. 7 B-VG) imposing the duty on the Austrian state to treat all citizens equally on the basis of the law (»principle of equality«) or a provision of the Austrian Constitution establishing the fundamental right of protection of individual property including the right of an individual to not be subject to expropriation by the state without just compensation.

A custom, long observed by all the countries, not to imprison duly accredited diplomats.

?

A treaty between the US and Japan under which each agrees to permit nationals of the other country to invest freely in its economy, and not to tax certain profits from that investment nor expropriate property without payment of just compensation.

IV. Where does European law fit in?

What is »European law«? Is it public or private international law, domestic law or international law? To answer these questions, we best begin by discussing the existing European organisations. **1/13**

A. European organisations

Until 2002, the European Coal and Steel Community (ECSC) was also counted among the European Communities, but the treaty has since expired and was not renewed. With the Reform Treaty of Lisbon of 2009, the European Community (EC), also part of the European Communities, merged with the »old« European Union – an umbrella organisation without legal personality – into the »new« European Union (EU), thus forming one single legal personality. **1/14**

The Council of Europe in Strasbourg is an organisation outside the EU system. It was founded soon after World War II by Western European democracies in response to the foundation of the Eastern European communist states. Its main objectives are the promotion of peace and the support of Western European ideals such as democracy, close cooperation and the protection of human rights. To date almost all Eastern European states have also become members of the Council **1/15**

of Europe. The most significant Convention drafted by the Council of Europe is the European Convention on Human Rights (ECHR). The ECHR established an important institution that ensures the enforcement of the human rights of the Convention by the Member States: the European Court of Human Rights (ECtHR) in Strasbourg.

1/16 The Organisation of Economic Cooperation and Development (OECD) with its headquarters in Paris is no longer a solely European organisation, given that Australia, Canada, Japan, Korea, Mexico, New Zealand and the USA are also Member States, while several Eastern European states are not members. Its history is, however, European as it developed out of the Organisation of European Economic Cooperation (OEEC). According to its mission statement, the OECD is to promote policies that will improve the economic and social well-being of people around the world and provides a forum in which governments can work together to share experiences and seek solutions to common problems. Thus, the OECD works with governments to understand what drives economic, social and environmental change by measuring productivity and global flows of trade and investment and by analysing and comparing this data to predict future trends.

1/17 The European Free Trade Area (EFTA) was founded in 1960 by a treaty among seven European countries that were at the time not members of the EU (Denmark, Great Britain, Norway, Austria, Portugal, Sweden and Switzerland), later joined by Iceland, Finland and Liechtenstein. Its aim was to simplify and enhance the trade among the signatory states. Many of EFTA's original signatory states later became EU Member States. Iceland, Norway and Liechtenstein – three of the four remaining EFTA members – are now part of the European Economic Area (EEA). The EEA is based on a treaty between its Member States, the EU and the EU Member States. It establishes a heightened free trade area (for

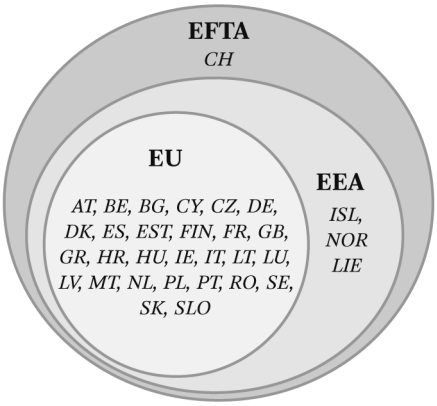

Figure 4: EU, EEA, and EFTA.

instance, by including the application of the four »European« freedoms, see no. 4/66 et seq., below) between its members and the EU Member States which are also part of the EEA. As a result, the EEA is the largest economic area in the world.

The last European organisation to be mentioned is the Organisation of Security and Cooperation in Europe (OSCE). It has 56 members from Europe, Central Asia and North America and forms the largest regional security organisation worldwide. It was founded in the 1970s with its main objective being the peaceful cooperation between East and West in the European North-Atlantic region. The main tasks of the OSCE today are the promotion of peace, arms reduction, the protection of human rights and of minorities, crisis management and post-conflict rehabilitation. **1/18**

B. European law versus EU law

All the above-mentioned European organisations are based on public international law treaties amongst signatory or Member States. One could say that they are all based on European public international law or on »European law«. The traditional terminology, nevertheless, distinguishes between the law on which the EU is based and the law which is produced by the EU, on the one hand, and the law concerning other European organisations on the other hand. »European law« in the traditional sense is restricted to EU law, excluding the law of other European organisations. **1/19**

The other European organisations (no. 1/15 to 1/18) are thus discussed in a separate chapter on general public international law. In this book we will follow the traditional distinction and terminology. »European law« in our sense therefore refers to EU law and nothing else.

What are the reasons for granting the EU this unique status in terms of which its law is referred to as »European law«? The EU is based on treaties between its Member States, namely the EU-Treaty (TEU) and the Treaty on the Functioning of the EU (TFEU) which initiated close cooperation and integration between them – not only on the economic level but also on a legal level. It is said that the EU is not only an economic **1/20**

community, but also a community of law. Some of the institutions of the EU have the power to create legal rules on their own and they have used this competence to produce a significant body of so-called »secondary« EU law that takes precedence over the domestic laws of the EU Member States. The extent of legal integration brought about by the unique powers of EU-institutions and the special nature of EU law justifies the treatment of EU-law as a specific body of law, unique in the realm of international organisations and international cooperation. It is thus generally referred to as »European law«.

C. Primary European law

1/21 European law can be divided into two different types of law: First, the so-called »primary« European law and second, the so-called »secondary« European law. The primary law of the EU consists of treaties concluded among all Member States. The founding treaty of the EU (TEU) is one of the most important of them. It was concluded by the Member States in Maastricht (in force since 1993) and was subsequently amended by the Amsterdam Treaty (in force since 1999), the Nice Treaty (in force since 2003) and the Lisbon Treaty (in force since 2009). The older TFEU, as amended by the Lisbon Treaty (2009), is equally important and determines the activities of the EU. The other »Communities« – EURATOM and ECSC, absorbed in 2002 into the former EC-Treaty – are (or in the case of the ECSC were) based on separate treaties.

1/22 The TEU stipulates a number of common goals including the promotion of peace and the establishment of an internal market, as well as principles, such as the principle of conferral, the principle of subsidiarity and democratic principles, which govern the activities of the EU. It furthermore contains general provisions on the EU institutions, as well as the revision procedure of the treaties and provisions regarding the admission of new Member States and the withdrawal of current Member States from the EU. Finally, the TEU also governs the EU's common foreign and security policy (CFSP). Due to its special, intergovernmental character, the CFSP is now the only EU policy area that remains outside the TFEU. Moreover, some provisions (see art. 21 et seq. TEU) that deal with the general aspects of the external activities of the EU (which are of relevance not only to the CFSP, but also to external commercial relations or humanitarian aid, both of which are regulated in the TFEU)

provide for special procedures and provisions in matters of the CFSP. This includes, for instance, the prevalence of unanimity with respect to Council decisions, that the European Court of Justice (CJEU) enjoys virtually no competence for judicial control as well as the limited influence of the Commission and the European Parliament.

Except for some general provisions, namely on the competences of **1/23**
the EU, the TFEU, which is far more voluminous than the TEU, largely consists of rules regarding Union policies and internal actions. These include the internal market policy, the four freedoms, competition, economic policy, social policy and energy, and institutional provisions, detailing the tasks and the composition of the EU-organs and including the procedures for the adoption of the EU's legal acts and the procedures applicable to the CJEU.

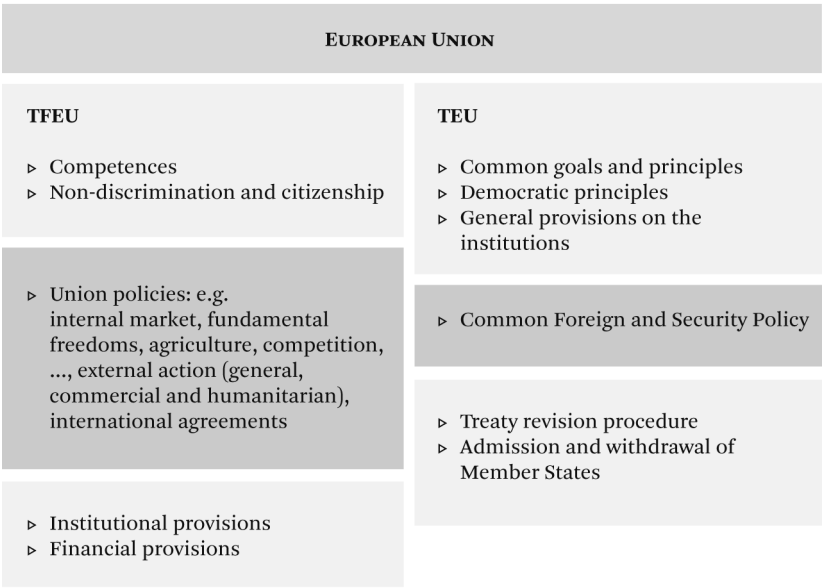

Figure 5: Overview of the content of TEU and TFEU.

Both treaties which form the basis of the EU are treaties in the tra- **1/24**
ditional sense of public international law in that they are treaties amongst states. Accordingly, if a treaty has to be amended, an agreement among all EU Member States is necessary; if one Member State does not concur, the new (amending) treaty – which is, of course, also a treaty of public international law – cannot be concluded. In other

words, all changes to primary European law must be unanimous. If states want to become new members of the EU and fulfil the necessary criteria, an accession treaty has to be concluded between the new potential Member State and the existing EU Member States. If one of the existing EU Member States refuses to sign the accession treaty, it will not come into being and the accession of the applying state will thus be denied.

The last treaty amending the EU-Treaty and the former EC-Treaty (now TFEU) was the Lisbon Treaty. So when we talk about EU primary law »after Lisbon« we refer to the TEU and TFEU as amended by the Lisbon Treaty. Similarly, the expression »before Lisbon« refers to the TEU and the TEC (EC-Treaty) as amended by the Nice Treaty, which was the penultimate amendment treaty.

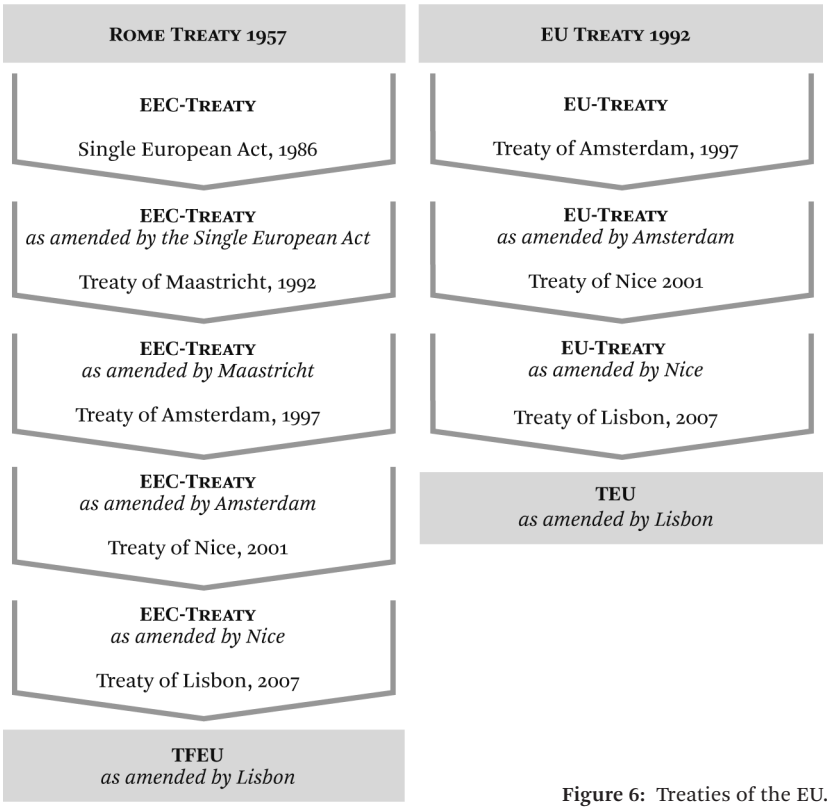

Figure 6: Treaties of the EU.

The last three accession treaties concerned the accession of ten new Member States in 2004 (Cyprus, Malta, Czech Republic, Slovakia, Poland, Slovenia, Hungary, Estonia, Lithuania and Latvia), Bulgaria and Romania in 2007 and the accession of Croatia in 2013. 1/25

D. Secondary European law

EU primary law not only creates several institutions of the EU which have to fulfil different functions (see no. 4/15 et seq., below) but it also endows some of these institutions with the powers and competences to create law. This law created by EU institutions is called secondary European law. However, due to the principle of conferral, the EU institutions may only create secondary law if there is a special competence in the TFEU or the TEU that allows them to do so. No general competences are included in the EU treaties which allow the EU institutions to simply create law whenever they choose to. 1/26

The legal acts that can be adopted by the EU institutions are regulations, directives, decisions, recommendations and opinions. Only the first two instruments have the character of generally binding sources of law whereas decisions are only binding in their entirety upon those to whom they are addressed and recommendations or opinions have no binding character at all. Regulations create »uniform law«; they are directly applicable in the Member States. Directives are not directly applicable in the Member States, but prescribe goals and rules to be implemented by the Member States via the adoption of national statutes. The laws created by respective national statutes to implement a directive are thus rarely uniform. While each Member State may implement the goals and rules of the directive in a different way, as they are underpinned by the same directive the implementing national statutes by nature share a common basis. As a result, EU directives do not create »uniform« law in the strict sense, but rather generate »harmonised law«. 1/27

There are several different procedures that have to be followed by the EU institutions when they adopt a legal regulation, directive, recommendation, etc. depending on the competence on which the legal instrument is based. In most cases all three above-mentioned institutions, that is, the Commission, the Council and the European Parliament, are involved in the process of law creation. The Commission – 1/28

which does not have the power to decide on the adoption of a regulation or directive – prepares the text of the instrument which is then adopted jointly by the Council and the European Parliament.

1/29 Secondary European law is adopted by the EU institutions to implement the goals and policies of the EU – such as a common European internal market, fundamental freedoms, antitrust, etc. – and is primarily economic in nature. The goals and policies of the EU have become broader and more numerous over time. Today they cover a variety of subjects that can no longer be directly linked to the internal market goal and the initially rather restricted and purely economic approach. Secondary law has, therefore, extended European law to a great number of fields of law. Innumerable provisions of secondary European law can be found in administrative law, the law of agriculture, in private law, choice-of-law, the law of corporations, commercial law, competition law, labor law, social security law and even in criminal law. Similarly, primary European law can be found to have an impact on all these fields of law.

Note that prior to Austrian EU membership all the above-mentioned fields of law were primarily, some exclusively, covered by Austrian domestic law (including Austrian law of corporations, Austrian labor law, Austrian administrative law). EU law now has a significant impact on these fields of law.

1/30 In the majority of cases the Council can adopt a regulation or directive (jointly with the Parliament) by majority decision among its members, which are the government ministers of all Member States. Only in exceptional cases is a unanimous decision among members required, for instance, in matters concerning the common security and defence policy (see no. 1/22, above). This lack of requirement of unanimity marks an important difference between the creation of primary and secondary European law. Primary law can only be created by unanimous action of all Member States. Secondary law can most often be adopted by mere consent of a majority of state ministers against the will of the non-consenting ministers that form the minority in the Council. Nevertheless, the regulation or directive adopted by the majority in the Council is also binding on the non-consenting states.

1/31 Another difference between primary and secondary European law is, of course, also the way in which the respective instruments are adopted. Primary law as an international treaty has to be adopted according to the procedures prescribed by public international law and national constitutional law (see no. 3/12 et seq., below). Secondary law must be adopted by EU institutions according to the procedures prescribed by the TFEU. The actors in the TFEU procedures for the adoption of secondary law are not the governments themselves via their direct competent representatives (as in the case of primary law), but rather the EU institutions: the Council and the European Parliament. The way in which these bodies are required to adopt the respective measures of secondary law is exclusively prescribed by the TFEU. No other rules of public international law or national constitutional law are involved in the creation of secondary European law.

1/32 There are two further important special features of European law which distinguishes it from other public international law:

- Primary and secondary European law have supremacy over the national law of the Member States including constitutional law. This is why we speak of the supremacy of EU law. If, for example, a rule of European law contradicts domestic Austrian law, the rule of European law will have priority over the domestic rule; the domestic rule may not be applied.
- The rules of European law have »direct effect«. This means that, under certain conditions, they must be directly applied by national courts and administrative authorities in a similar manner to the rules of domestic law. There is no need for further implementation of European law by national statutes in order to render them directly applicable in the respective national legal systems.

1/33 The fact that the EU was established to achieve a set of ambitious common goals amongst its Member States and that the legal institutions of the EU were created for this purpose evidences that the EU represents a departure from the traditional »intergovernmental« nature of the international legal order and from the traditional regime of international treaties in the sense of public international law. Quite contrary to ordinary international treaties, the TFEU has created its own legal system which has become an integral part of the legal systems of the Member States and which, due to EU law's supremacy and direct effect, their courts are bound to apply.

The CJEU, which initiated the doctrines of »supremacy« and »direct effect«, described the special nature of European law that distinguishes it from other public international law in its decision CJEU 18.7.1964, C-6/53, Costa v. ENEL, ECLI:EU:C:1964:66 (see no. 4/55, below), as follows:

»By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.«

E. The separate category of European law

1/34 We have now gathered enough information to answer the initial question of this chapter, namely, whether European law is public international law, private international law or something else.

1/35 The primary EU law – TEU, TFEU, the amending Treaties of Maastricht, Amsterdam, Nice and Lisbon and the Accession treaties – are treaties in the sense of public international law. But, as we discussed previously, it is not the instruments themselves which are decisive in qualifying their legal rules as public international law or private international, but rather their content. We noted that some treaties contain rules on private law and that, accordingly, their rules are not rules of public international law, but of private international law. The TEU and the TFEU, on the other hand, contain provisions on the organisation of the EU, for instance concerning the institutions of the EU and their powers. This sphere of EU law is called »institutional European law« and its primary law rules can be classified as public international law. They establish the EU as a European organisation of public international law.

1/36 But the provisions of the TEU and TFEU are not restricted to organisational and institutional matters. They also contain so-called »substantive« or »material European law« which consists of rules that have a direct impact on the different fields of material law in the Member States. Examples are the non-discrimination rule in art. 18 TFEU, the fundamental freedoms in artt. 34 et seq. TFEU as well as the antitrust rules in artt. 101 et seq. TFEU.

1/37 The majority of rules of secondary European law, especially regulations and directives, fall under so-called »material European law«. As mentioned above, the rules of EU regulations and directives pervade almost all fields of material law. The content of material European law rules is unrelated to public international law but rather associated with the fields of material law mentioned. Thus, material European law is not public international law. Material secondary as well as primary European law establishes uniform or harmonised rules of international (European) character and origin in almost all fields of private and public law. All material rules of European law that are included in the field of private law can therefore be considered part of private international law, namely part of uniform (or harmonised) private law. All material norms of European law concerning material public law, such as administrative law can be considered to establish uniform (or harmonised) public law, and uniform administrative law.

1/38 In essence, due to the special features of material EU law – the far-reaching legislative competence of the EU institutions to create secondary material law, the supremacy of European law over the law of the Member States, and its direct applicability in the Member States – the EU is distinctively different from other organisations of public international law. We could, therefore, say that all material EU law that is applicable to the domestic private law of the Member States is – according to its contents – private international law, specifically uniform private law, and that material EU law that interferes with the national public law of the Member States is according to its content uniform (harmonised) public law. From this perspective, uniform (harmonised) private law as a sub-discipline of the international dimension of private law is composed of two types of law, namely the uniform private law created by international treaties (for instance the CISG) on the one hand and the uniform (or harmonised) private law created by EU regulations and directives on the other hand. The latter category is commonly referred to as »European private law«.

1/39 Because of its special features, European law – both primary as well as secondary and institutional as well as material – is normally regarded as falling within the confines of the traditional disciplines of public international law and private international law, even though it would be justifiable as explained above. Instead, European law is usually considered as a special category of law, namely, that of European law. The usual way of teaching European law is to treat it as a separate

subject, that is, not as a part of public international or private international law, and to divide the subject into the two parts, namely, institutional European law and material European law.

1/40 Another approach to teaching European law is to teach the particular facets of material European law as part of the corresponding fields of private law. So, for instance, one would teach European private law as part of the fields of private law, commercial law, corporations, patent law, antitrust, competition, individual labor law, etc. or teach European public law as part of the fields of administrative law, criminal law, procedural law, etc. The two approaches supplement each other: the subject of institutional and material European law identifies the basic principles and provides a general overview of European law as a whole, while the details of material European law can be studied in the corresponding fields of material law.

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Attempt to identify to which category/categories of European law the rules mentioned in the following examples belong (i.e. primary or secondary law, institutional or material law). Who created the respective rule(s)?

- Artt. 26 et seq. TEU prescribe the duties of the (European) Council (and the High Representative) in the field of the so-called »Common Foreign and Security Policy« (CFSP).
- Artt. 251 et seq. TFEU contain rules on the composition of the Court of Justice of the EU and its competences.
- Company A terminates its contract with its agent B; B contends that A has the duty to pay him a certain amount of compensation according to an EU directive on agency contracts.
- Art. 34 TFEU defines the fundamental freedom of trade. According to art. 34 TFEU Member States are not permitted to restrict cross-border trade transactions among themselves in terms of national rules. German company C was prevented from selling its products on the Austrian market to Austrian consumers by an Austrian court. The Austrian court argued that the labels attached to the products violated an Austrian domestic rule on food safety. Company C contends that the Austrian rule allegedly violated is itself contrary to art. 34 TFEU.
- An EU directive contains rules of labor law that confer rights on the employee (against his employer) under the employment contract.
- The norms of the EEA Treaty establish a heightened free trade area between the EU Member States and the (remaining) EFTA Member States (except Switzerland).

V. Private international law

A. What constitutes a »conflict of laws« problem and when does it arise?

The terms »conflict of laws« and »private international law« describe interchangeably one of the international dimensions of private law which additionally includes the fields of uniform private law and comparative private law. »Conflict of laws« is the discipline that deals with the legal aspects of cross-border private law matters when there is no uniform private law applicable to the issues raised. **1/41**

Uniform private law, established by international treaties and EU legislation, covers a relatively limited range of private law questions to date. Accordingly, if, in a cross-border dispute, private law questions are raised that are not covered by a uniform private law treaty or a European regulation, the parties find themselves in a situation where the private law rules of more than one state are potentially applicable. Here, we have a cross-border legal relationship. **1/42**

A traffic accident involving an Austrian driver and a German driver that occurs in Germany has potential implications in both German and Austrian domestic law. If the German driver demands damages from the Austrian driver, the question arises whether German (substantive) private law or Austrian (substantive) private law will be applicable to the damages claim. This question is answered with reference to »choice-of-law« rules. Other legal questions will also arise: For example, the German driver will also ask himself or herself whether he or she can sue the Austrian in a German court or only in an Austrian court, which is the question of adjudicatory jurisdiction, and whether the judgment rendered against the Austrian by a German court will be recognised and enforced in Austria, which is a question of recognition and enforcement.

The discipline that deals with questions of choice-of-law, adjudicatory jurisdiction and recognition and enforcement of judgments is called »private international law« or »conflict of laws«. Whenever the facts of a case involving private persons have connections to more than one state and the relevant rules of substantive law are not uniform in the states concerned, the legal situation that arises can be described as a »conflict of laws«. If the domestic rules of all states that have a potential legal **1/43**

connection to the case were applied, the likely outcome would be the application of contradictory and conflicting rules. We therefore need a »choice-of-law rule« that indicates the »substantive« law of which particular state must be applied to the legal question concerned. In order to avoid contradictions, the substantive law of only one of the states can be applied. Subsequent additional questions that will arise are that of the competent court to adjudicate the matter and the possibility of enforcing the judgment in other jurisdictions. We will address these questions later (see no. 2/6 et seq., below).

1/44 The situation of a »conflict of laws« not only arises with respect to private law issues, but also with respect to all other fields of substantive law, for instance, in criminal law, administrative law and procedural law.

If an Austrian national commits a crime in Italy, in which state are the criminal courts competent to adjudicate the matter? Austria or Italy? Will the court be required to apply Austrian or Italian criminal law?

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A French national wants to open a restaurant in Austria. He or she is allowed to operate a restaurant under the rules of the French Industrial Code but not under the Austrian »Gewerbeordnung« (the functional equivalent to the Industrial Code). Are the French or the Austrian rules applicable to the situation? Which country's administrative authorities are competent to enforce which rules?

If a court is confronted with a cross-border private law or criminal law case, the procedural law of which state must be applied?

1/45 It is thus clear that the problem of »conflict of laws« arises with respect to all fields of substantive law as soon as a case has connections to more than one state and the relevant substantive legal rule(s) is (are) not uniform in the respective jurisdictions. Conflict of laws problems can potentially arise in all fields of private law as well as in administrative law, criminal law and procedural law.

B. The application of foreign law

1/46 There is, however, a major difference between »conflict of laws« issues in private law, on the one hand, and »conflict of laws« matters in pub-

lic law, on the other hand, namely the potential application of foreign law to the case.

1/47 A court that is confronted with a private law case that has connections to Austria and one or more other state(s) will either have to apply Austrian private law or the private law of one of the other states concerned. In other words, if the choice-of-law rule points to the private law of a foreign state, the Austrian court is obliged to apply this state's foreign private law instead of Austrian private law.

1/48 This is entirely different in all issues of public law. Here, national courts and administrative authorities will only ever apply domestic national public law even when confronted with a public law case that has connections to a foreign state. An Austrian criminal court will thus only apply Austrian criminal law, an Austrian administrative authority will only apply Austrian administrative law, and all other Austrian courts will only apply Austrian constitutional law and Austrian procedural law.

1/49 However, we have to keep in mind that material European law has to be applied by national courts and administrative authorities as if it were domestic law, even in fields of public law. Thus, if Austrian courts and agencies have to apply »Austrian« criminal, administrative, constitutional and procedural law in public law matters, in practice this means »Austrian« law including all norms of material European law that are valid within the Austrian legal system. Even substantive uniform law created by international conventions, such as the CISG, is considered to be part of the Austrian legal system and, therefore, a part of »Austrian« law.

1/50 As a result, national courts and administrative authorities are frequently required to apply foreign private law, but they never apply rules of foreign public law. This does not, however, mean that no »conflict of laws« problems arise with respect to public law; rather, such problems simply have to be approached in a different way. A national court or administrative authority confronted with a criminal or administrative law matter concerning more than one state (see the examples above) has to determine whether it is competent to adjudicate upon the merits of the case. If it is competent, it will then apply its national criminal or administrative law to the case.

If, for instance, an alleged criminal is an Austrian citizen, the relevant criminal conflict of laws rule would give competence to an Austrian

court and, based on this competence, the Austrian court will apply Austrian law.

The administrative conflict of laws rule determines that the administrative authority is competent and authorised to apply the Austrian »Gewerbeordnung« in a matter concerning a Frenchman seeking to establish a business located in Austria.

The procedural conflict of laws rule dictates that the Austrian court or agency must always apply Austrian procedural law.

1/51 However, it is only in public law cases that both questions – adjudicatory jurisdiction and applicable law – are linked. In contrast, in private law cases both questions must always be addressed separately (see no. 2/6 et seq., below).

VI. Comparative law

1/52 »Comparative law« – as its name suggests – is the discipline that deals with the comparison of legal rules of different national legal systems. The domestic rules in almost all fields of law differ from one state to another. Consequently, there is a need to find a way to effectively compare the rules of different legal systems. The discipline of »comparative constitutional law« compares the constitutional law of different states while the discipline of »comparative private law« compares the private law of different states, and »comparative criminal law« compares the criminal law of different states, etc. When comparing legal rules stemming from different legal systems which frequently arise, questions include: Are the rules chosen for comparison comparable? – If yes, why, and if not, then why not? If the rules compared are found to be different, why are they different? What conclusions can be drawn from the comparison and to what extent is it helpful? The key questions of comparative law are, first, the choice of comparative method to be used and, second, the definition of the goals of the comparative study. Regarding the latter, the usual objective of comparative studies is to gather information about foreign legal systems and to establish similarities and differences.

In the following, we concentrate on the basic purpose of comparative law. Why is comparative law helpful and under what conditions can it be used? We start by identifying the different ambits of comparative law studies and drawing a dividing line between the disciplines of comparative private law and comparative public law. 1/53

A. Comparative private law

As we have discussed earlier, in the field of private international law »choice-of-law rules« serve a unique function, namely, they determine whether a court must apply domestic or foreign private law to a cross-border case (see no. 1/41 et seq., above). The choice-of-law rules act as a »mediator« between the potentially applicable (conflicting) state laws. They have to take into account all the connections of the case to the two or more relevant states and identify criteria for determining which state's law is applicable. Choice-of-law rules are usually formulated broadly with the aim of rendering a variety of legal systems potentially applicable. 1/54

For instance, no choice-of-law rule is phrased as follows: »Austrian law is applicable to contracts« but rather: »contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence«.

Choice-of-law rules are formulated to potentially include all the private law systems of the various states relevant to the particular issue, as in our example above where the rule is the »habitual residence of the seller«. The notions and criteria used by choice-of-law rules can therefore only be understood with knowledge of comparative private law and of the private law systems of different states. 1/55

This specific way of interpreting choice-of-law rules is commonly referred to as »characterisation« as developed by the Austrian legal academic Ernst Rabel. We will discuss the question of characterisation below in greater detail (see no. 2/29 et seq., below), for the time being it suffices to understand the first specific purpose of comparative law, namely, that comparative private law serves as a basis for the interpretation of choice-of-law rules. 1/56

1/57 Practitioners and judges dealing with private law matters with links to foreign jurisdictions are often confronted with the fact that it is not domestic but rather foreign private law rules that are applicable to the case before them. They must, therefore, be able to determine the contents of the foreign private law rules applicable to the case. At best, domestic lawyers usually have only a vague knowledge of foreign legal systems. However, this is changing in light of ongoing comparative law research, publications and, thus, readily available information on foreign legal systems (in the form of articles, books and databases) which is of great assistance to practitioners and courts.

1/58 The benefit of knowledge of substantive foreign law does not stop with the determination that foreign law must be applied due to a choice-of-law rule. In some areas of private international law, for example, the parties to a contract may choose the law applicable to the contract (see no. 2/32, below). In such instances, knowledge of foreign private law enables the parties and their legal advisors to make a reasonable choice regarding which law to apply to their relationship depending on their interests.

1/59 In certain fields of private law, such as family or property law, however, no such choice of law is possible, but nevertheless knowledge of the different legal regimes enables parties (via their legal representatives) to adjust their activities in such a way that the legal system best suited to protecting their interests becomes or remains applicable. Both approaches exemplify why adequate knowledge of foreign private law systems gives parties and practitioners considerable professional advantage over colleagues who have a limited understanding of only one specific domestic legal system. Comparative private law is an important tool for both courts and practitioners who are required to determine the specifics of foreign private law rules applicable to cross-border cases.

B. The overall purpose of comparative law

1/60 As we have discussed earlier (see no. 1/48, above), in public law there are no choice-of-law rules prescribing the application of foreign law. Hence, in the field of public law, courts and administrative authorities are never confronted with the need to apply foreign public law. The obvious question then is whether it makes sense to inquire about foreign

public law at all. There are, of course, several other purposes of comparative law independent of the application of foreign legal rules in another state. This makes it worth addressing this issue. Below we will discuss two pivotal purposes beyond that of a day-to-day practitioner's approach, namely, first, the assistance that comparative law can provide legislators when it comes to amending existing domestic rules or creating new rules and, second, the advantage to law students, practitioners and academics alike of gaining a better understanding of their own legal system in relation to other legal systems worldwide.

1/61 Comparative law provides potential assistance to the legislature. In developing a new legislative project, such as a statute, the legislature may find it helpful to refer to how other legal systems have dealt with the facts or socio-economic problems that they seek to address. Comparative law is useful in obtaining and interpreting the information about the corresponding rules in foreign legal systems. In fact, specifically in certain fields of law, national legislation is increasingly based on extensive studies of comparative law. It is generally opined that national legislation rooted in extensive comparative law research is of superior quality to that where no such research has been undertaken. The national legislator, however, is generally under no duty to develop its legislation with reference to comparative law.

1/62 Knowledge of comparative law also provides a better understanding of one's own legal system and provides one with basic orientation in a world of differing legal systems. Law students as well as practitioners and academics should not only have knowledge of the black letter rules of their domestic legal system but should also understand the underlying goals, purposes and effects of their law in order to meet the expectations attached to their respective professions. The best way to develop a thorough understanding of one's domestic legal system is to view it in relation to other legal systems. Teaching which focuses only on the rules of one's own domestic legal system inaccurately conveys the impression that there is only one way of addressing a legal problem whereas in fact, there are usually several alternatives for addressing a certain legal problem.

Remember your first semester courses. Here, you were taught how the Austrian state is organised on the basis of the Austrian Constitution, about the powers of the government, the Parliament and the Constitu-

tional Court, of the rights of buyers when the goods they bought are defective, about the amount of child support a child can demand from its parents, etc. Did you think that this is the only way the law can be? Or did you consider the idea that these rules might be different in other states or that they could be different in your own system? If your answer to the second question is »no«, this illustrates what we mean.

1/63 If you are armed with knowledge about foreign legal systems and, accordingly, how different legal problems can be addressed, you will understand that there is no one perfect legal solution but rather a whole range of possibilities. By comparing the goals, purposes and effects of a domestic rule with that of possible alternatives in foreign legal systems you will acquire important background knowledge that enables you to look at your own domestic rules in a new, more critical way and as a result, you will develop a deeper understanding of your legal system.

1/64 Furthermore, if you compare the developments of the different legal systems in Europe or in the world, you will notice that certain states have adopted the solutions of other states to legal problems which have led to the development of so-called legal families. Following these lines of international legal development will not only improve your understanding of your domestic legal system, but will also provide a fundamental orientation in a world of legal systems and thereby facilitate your ability to access foreign legal material where necessary.

C. Rules of European or international origin

1/65 From our previous discussion we know that international treaties as well as European law sources often contain rules of substantive private or public law, at times directly applicable in the signatory states or in European Member States (see no. 1/32, above). These legal instruments create uniform or harmonised private or public law rules, that is rules (somewhat) identical in all the instrument's Member States. Examples are the CISG and the numerous EU regulations that deal with various issues of public and private law in the EU Member States (see no. 2/28 below and no. 2/16, below). Comparative law research plays an important role with respect to these internationally or Europe-wide uniform rules in two particular situations. Comparative law has a sig-

nificant role to play first in the creation of such instruments and, second, once in force, as the basis of uniform interpretation of these rules in all signatory or EU Member States.

1/66 In contrast to national legislators who may or may not consult foreign legal solutions in developing their domestic legislation, drafters of international uniform law and the European legislator are obliged to consult comparative law when drafting new legislation. In order to produce a draft acceptable to all states concerned, it is mandatory for the international or European legislator to take into account all the different legal systems of the signatory states or EU Member States in the field of law affected. Towards this end, extensive studies of comparative law are constantly conducted and form the basis of every »act of legislation« at the European or international level.

1/67 When a legal rule is adopted, in applying the law the legal profession turns to the rule's interpretation, that is how the legal rule should be understood in a specific context. Indeed, most legal systems have developed domestic principles of interpretation which thus vary from state to state. Generally, national principles of interpretation include references to the meaning of specific terms and their meaning in the context of particular sentences and in the system in which they are used, to the intentions of the legislature when it adopted the law and, finally, to the goals of the provision in question. All interpretation of legal norms of domestic origin is guided by this domestic interpretative system and with scant regard to relevant foreign legal rules.

There are rare exceptions to this purely domestic approach to interpretation; one of these is, notably, of Austrian origin. § 7 of the Austrian Civil Code states that if a question of interpretation cannot be solved by the above-mentioned traditional means of interpretation the interpreter must seek interpretative guidance in the »natural principles of law«. Historically, the theory of »natural law« was the basis of all legislation at the time of the enactment of the Austrian Civil Code in 1811. There was an assumption that a »natural law« common to all states in Europe and worldwide existed at this time. The legislators therefore sought to »determine« this natural law and to replicate it to the extent possible when formulating the rules of the Civil Code or, indeed, any other legislation. If, on rare occasions, an Austrian rule remained ambiguous, the assumption was that the Austrian legislator had failed in expressing the principles of natural law. The interpreter was, therefore, advised to look at comparable rules of other legal systems which might

have better approximated the ideal of natural law. Today, while there is no longer support for the idea that »natural law« is the basis of our legal system, the reference in § 7 ABGB to the »natural principles of law« is understood as an invitation to look to other legal systems and draw conclusions from a comparison of laws where the legal rule under interpretation shows a proximity to international and European legal developments.

1/68 However, it must be duly noted that such »comparative law interpretation« is the exception when it comes to legal rules of domestic origin. Primarily, it is an important element of interpretation with respect to rules of international or European origin and the comparative law interpretation is the mirror image of the comparative law origin of international and European instruments described above. As noted, the uniform rules are drafted with the Member States differing legal systems in mind and must be interpreted as such.

1/69 Two final important issues must be addressed in bringing our discussion on comparative law interpretation to a close. First, we need to look at what interpretative conclusions can be drawn from a comparison of different legal system and, second, which institutions may be competent to interpret international or European instruments in a comparative way.

1/70 If a rule of international or European origin contains vague terms such as »contract«, »unfair«, or »unreasonable«, the interpreter can commence by looking at what the respective terms mean in the legal systems of other Member States. The meanings may be entirely different or even opposing in the various Member States' legal systems in which case the majority view is followed, i.e. the meaning favoured by the majority of systems. If this is not the case, the interpreter evaluates the different meanings found in the different legal systems in depth giving due attention to the goals and purpose of the relevant legal instrument itself as well as the effect on those subject to the legal instrument. This comparative method of interpretation is by no means a technical tool that automatically produces the best solution to the interpretative problem at issue. Rather, the outcome that emerges from a comparative investigation is somewhat subjective and will likely differ from one interpreter to the next.

1/71 Accordingly, it seems desirable to render one institution competent to interpret international and European legal instruments. Regarding

uniform law based on international conventions, such as the CISG, no such institution exists leaving the door open to divergent application and interpretation of the law. International conventions thus oblige the courts of the signatory states to apply the principles of interpretation laid down in the convention itself rather than their own national principles of interpretation thereby ensuring that national courts take due account of the international character of the rule. When interpreting vague terms like »contract«, the national courts are obliged to refer not only to their domestic legal system but also to compare the meaning of the term »contract« in the different legal systems of the signatory states with a view to finding an acceptable »intermediate« solution between differing interpretations. As discussed above, such comparative law interpretation is by no means a guarantee for reaching uniform solutions of interpretation problems. Nevertheless, it leads to a greater degree of uniformity than would arise if the courts of each signatory state were to refer only to their domestic interpretation of such »uniform« rules.

1/72 The situation is, however, entirely different with respect to European law. As discussed, the rules of European law must be applied and interpreted by the national courts of the Member States. If, however, the court of a Member States discovers an ambiguity in interpreting such a rule it may – and in the case of the court of final appeal, it must – refer the question to the Court of Justice of the European Union (CJEU) for a preliminary ruling (see art. 267 TFEU). The CJEU's interpretation is binding on the court as well as on all Member States (see no. 4/49, below). This procedure leads to a uniform interpretation of European law in all Member States. Accordingly, the degree of uniformity in European law is considerably higher than the degree of uniformity that can be reached by an international uniform law convention. For the CJEU, the comparison of the relevant legal rules of the Member States is also an important means of interpreting European law.

VII. The law as a multi-level system

1/73 By now we have discussed numerous new definitions and you have been confronted with various new terms and phenomena, some of

which you may not have heard of before. The sole purpose of this chapter was to introduce all the topics covered in this book and to provide references to later chapters. Accordingly, you will probably not understand all concepts presented until you have studied the rest of this book. To help you we conclude this chapter with a small summary of the different international fields of law and outline some basic connections between these fields.

1/74 If one looks beyond the rules of domestic origin, the realm of international law seems very complicated. The ongoing process of »internationalisation« and »Europeanisation« of law has further complicated our understanding of the law and the provision of legal solutions to parties seeking legal advice. With this in mind, one might ask whether the ongoing process of internationalisation and Europeanisation is indeed necessary and worthwhile and whether it should be continued or not. Further, one might question the justification for the continued production of vast quantities of international and European law and of domestic rules that deal with the international dimensions of cases.

1/75 The reasons for the proliferation of international and European rules are manifold including the promotion of peace among nations, the protection of human rights, the enhancement of economic development, the augmentation of the wealth of our societies and citizens and the protection of natural resources. However, there is one underlying cause, namely, the protection of the basic values necessary to realise a life worth living. As a consequence of the development of technology, economies, politics and cultures, these values can increasingly no longer be protected by the isolated efforts of national legislators and governments.

1/76 Historically, treaties between states were only concluded for reasons of war or peace and the acquisition of new territory. The only subjects bound by international law were the states. Increasingly, the citizens of these states felt the need to protect and promote their own basic interests and values, such as human rights, economic wealth and their environment in a more effective manner and the number and scope of international instruments accordingly expanded to this end. With the inclusion of rights of individuals and other private entities in international legal rules, the process of »internationalisation« and later also of »Europeanisation« of law gained increasing momentum. Nowadays the creation of rights and duties of private persons is the indispensable key element of all international and European

instruments as, without such rights and duties, it would be impossible to achieve most of the above-mentioned goals. Thus, the paradigm of international law changed from the traditional cooperation between states – creating rights and duties of states – to the direct integration of citizens of these states into the system of international law.

1/77 It is this integration of private persons and entities that also blurs traditional borders making it difficult to understand the various relations between domestic and international law. In former times traditional public international law was a matter between states, with domestic law dealing with the rights and duties of private persons; when the activities of private persons crossed borders – which happened less frequently than today – states provided domestic conflicts rules determining the application of their own domestic law or foreign domestic law.

1/78 So how can the more complex legal scenario of today be systematised? To navigate the otherwise confusing world of domestic and international legal norms you should always ask yourself three questions about the legal rule you are dealing with. First, what is the origin of the legal rule? Is it a domestic statute, an international treaty, an international custom or an act of European legislation? Second, what is the purpose and content of the legal rule? Is it exclusively aimed at states thus creating only rights and duties of and between states and not of private individuals? Does it deal with the organisation of an international body or the EU and its institutions and is thus a rule of institutional law? Does it (also) create rights and/or duties of private persons vis-à-vis another private person, the state or an international organisation or the EU? If it is a rule that creates rights and/or duties of private persons and is, thus, a rule of substantive law, to which field of law does it belong? Is it private law in the narrower sense, namely commercial law, labour law, administrative law, criminal law, etc.? Or is it a rule that does not create rights and duties of private persons and is thus not substantive law, but rather a rule that only determines the substantive law which is applicable to a case and thus, a choice-of-law rule? Third, which institution is competent to apply, interpret and enforce the legal rule? Is there an institution endowed with the binding authority to apply and enforce the rule at all? In traditional public international law, which creates rights and duties of states against states, such an institution is often absent. Is the rule directly applicable by the national court system? Is it part of the domestic legal system? Are there institutions of

the relevant international organisation or the EU that have the power to apply, interpret or enforce the rule?

1/79 Sociologists created the term »multi-level system« to describe how different groups of rules that are produced by different political actors co-exist and interact in a certain system. As discussed above, primary and secondary European law must be considered as a separate system of law, having its own characteristics and following its own goals and rationales. You could, therefore, regard the whole of European law as a separate level of law. This European level can be contrasted to the domestic level of law and to the level of production of rules of international law that is not European law. The totality of all levels of rule production forms our legal system, which thus becomes a multi-level system with various different relations between the European, domestic and the international levels.

Take, for example, the relationship between the European and the domestic levels. The first and foremost relation is that of the supremacy or superiority of European law over domestic law. Thus, a new level is added to the hierarchical system of domestic law. European law is at the top of this domestic hierarchy. No domestic rule may contradict the fundamental freedoms laid down in the TFEU.

1/80 Apart from this vertical, hierarchical aspect of the relation between the European and domestic level, there is also a horizontal aspect: material European law is directly applicable in the Member States. The norms of material European law never apply to a whole field of substantive law, but only to distinctive situations.

For instance, the European doorstep-selling directive grants the consumer the right to withdraw from a contract when the contract was concluded outside the business premises of the entrepreneur, namely the consumer's home. But there are no general rules under which the contract is valid and nothing is stated about the fate of the performances already engaged in by the parties.

1/81 All remaining general questions must be addressed by those rules of domestic contract law of the respective Member States which are not

superseded by the rules of the directive. This means that, at the horizontal level, European rules and domestic rules operate side by side; they have to supplement and complement one another.

1/82 One may explain this horizontal link of the European and the domestic level of rule production by comparing the different levels of rule production to the different levels of legal application and enforcement. Legal rules can be enforced either at the interstate level – one state exercising influence and power over another state in order to ensure the latter state's compliance with its legal obligations – by international institutions – for instance, the CJEU or the European Commission, the European Court of Human Rights, the UN Security Council – or by national institutions – national courts or administrative agencies, as in the case of EU law norms which have direct effect in domestic law. If a rule is of public international law or European law origin but must be applied and enforced by domestic courts, one can safely assume that the level of production and the level of application and enforcement of the respective rule are intertwined or overlapping.

1/83 As a result, you can best comprehend the international dimension of the law when aware that different levels of law – and, thus, law production as well as law application and enforcement – are inherently linked. When addressing legal problems, such as, for example, the avoidance of a consumer contract, the consequences of such avoidance, and subsequent enforcement, you must be aware that different international levels of relevant rules exist – with some of them »disguised« as domestic rules – belonging to different levels of law production, which, accordingly, must be treated differently. This includes taking into account the levels of legal application and enforcement which frequently do not correspond with the levels of law production. This illustrates the importance of a clear concept of the rule at hand and the need to always address the three above-mentioned questions (see no. 1/78, above).

Always make sure that you can categorise the origin and content of the legal rule to be analysed, and that you are aware which institution has the competence to apply, interpret and enforce the legal rule in question (see no. 1/78, above). If you cannot answer these questions with the assistance of this book, attempt to study the text again more carefully and consult your colleagues and instructors.

▷

Always read the original wording of the rule at hand. Inevitably, at some point of your studies and career, you will have only the text of a legal rule to rely on and you will be expected to use this text as the basis of your answers, arguments and litigation; general knowledge or deliberations will not suffice. If you are unfamiliar with the original wording of the legal norms and do not know how to find them, you will not be able to effectively argue your point. The original wording of the legal rules studied in this book is rarely reproduced here; you will only find a commentary and explanation of the legal rules. It is up to you to conduct an independent search for these rules and to study their wording; this is an indispensable prerequisite to successfully complete your studies and to ensure your future successful work in legal practice.

Chapter 2

The International Dimensions of Private Law

I. Private international law

A. Introduction

The field of private international law (PIL or conflict of laws, see no. 1/2, above) has changed fundamentally in the last decade as a result of increased activity of the European legislator. Alongside international conventions and national law, a set of unified rules applicable to cases concerned with foreign jurisdictions has been enacted at the European level. In almost all private international law fields, the hitherto applicable national rules have been replaced by directly applicable European regulations in this regard. Indeed, private international law is one of the fastest developing areas of practice and, hence, is a field worth studying. **2/1**

In the following chapter the basic concepts of private international law are introduced beginning with abstract illustrations and later moving on to real life cases. In the course of these cases we will discuss contractual obligations and non-contractual cases with a foreign element. But before we proceed to examine individual private international law categories (jurisdiction, choice-of-law and enforcement), we begin with a purely domestic private law dispute to illustrate the concept. **2/2**

Seller A in Austria and buyer B also in Austria conclude a contract for the delivery of certain goods in Austria on 11 October 2014. The contract specifies the nature of the goods to be delivered, as well as the price to be paid. When A delivers the goods on 12 October 2014, B refuses to take delivery or pay for them. A then sues B for damages in an Austrian court. Three questions have to be answered: First, which court is competent to hear the action of A against B? Second, which law will be applied by this court? And third, how can the judgment of this court be enforced?

2/3 In this purely domestic illustration we can safely assume that Austrian courts will have jurisdiction and are competent to adjudicate this dispute. The courts in literally any state will exercise jurisdiction in a private law action brought against a party domiciled in that forum state by a person also domiciled there. This assumption derives from the universally accepted maxim found in the domestic procedural law of all states, namely, »actor sequitur forum rei« – the plaintiff follows the defendant to his or her forum. Put another way, the defendant's domicile provides a general basis for the forum court to assume jurisdiction over the claimant and, thus, adjudication of the plaintiff's claim, whatever its subject matter might be.

2/4 Once a domestic court has jurisdiction, it has the power to adjudicate the substance of the case, and in a purely domestic case, the court will do so by applying its domestic law to the facts. Indeed, in the case above, we can assume that the competent Austrian court will unhesitatingly apply the substantive contract law of Austria to determine the rights of the parties based on the fact that Austrian private law is the only conceivably relevant law.

So if we assume, for instance, that B was not entitled to reject the goods and refuse to pay for them, because a one day delivery delay is not deemed a significant delay under Austrian law, the Austrian court would have good reasons to render a judgment on the merits in favour of A.

2/5 Assuming that the judgment rendered by the Austrian court in our illustration is not appealed to a higher court, that judgment will be recognised and enforced throughout Austria, simply because sovereign states invariably recognise and enforce final judgments rendered in their own courts. So if, as we have just assumed in our illustration, A wins under Austrian law, that judgment will surely be enforced throughout Austria, if necessary by state force.

Figure 7: A standard domestic private law case.

B. The foreign element

Now to highlight the relevance of private international law rules in an analogous international scenario, we can adjust our purely domestic private law scenario by injecting a single »foreign« element. 2/6

Seller A in Austria and buyer B in Germany conclude a contract for delivery of certain goods in Germany on 11 October 2014. The contract specifies the nature of the goods, as well as the price to be paid, but neither designates a specific forum for the resolution of disputes which might arise nor the substantive law applicable. When A delivers the goods on 12 October 2014, B refuses to accept or pay for them. A then sues B for damages in an Austrian court.

Again three questions have to be answered. Which court is competent to hear the action of A against B? Which law will this court apply? Can the judgement by this court be enforced in another country?

The only difference between this illustration and the previous one is the foreign element »Germany«, the buyer's foreign domicile, but this element renders the legal landscape in our illustration »international« and, as we shall see, much more complex, since the foreign element raises a series of private international law issues, each of which might well affect the eventual outcome of the dispute. 2/7

As the defendant B in our illustration is not domiciled in the forum state Austria where the plaintiff A has decided to bring his action, we cannot take for granted that the Austrian court is competent to adjudicate the parties' dispute. To resolve the competency issue, the Austrian court must first consult the relevant rules on international jurisdiction. Once the Austrian court determines the relevant international jurisdiction rules – which might, for instance, be the jurisdiction rule which applies to contractual matters – it may ascertain whether there is a basis for the assertion by the Austrian courts in a case like this. In other words, the first PIL step might be really a two-step affair: First the relevant rules need to be determined and, on the basis of these rules, the international competence of the court to adjudicate on the matter can be established. 2/8

If the Austrian court determines that it is in fact competent to adjudicate on this matter, that is to say it has international jurisdiction in our illustration, B's lawyer then might advise B to travel to Austria 2/9

or hire a legal counsel there for the purpose of appearing voluntarily before the Austrian courts and defending B's position, for instance by contesting the merits of A's claim. If, on the other hand, the relevant private international law rules on jurisdiction lead to the conclusion that the Austrian court is not competent and, thus, cannot exercise jurisdiction, the court must simply dismiss A's case. Technically, this means that neither party wins since the court does not render a decision on the merits of the case.

Figure 8: A private law case with a cross-border element.

2/10 To take the next step in our international scenario, let us assume that the application of the relevant jurisdiction rule (step 1, no. 2/3, above) leads to the conclusion that the Austrian court is in fact competent to adjudicate in the case. Let us also assume, for the present purposes, that B appears to defend himself. Having determined its competence, the Austrian court will now need to take the next major private international law step which relates to applicable substantive private law. In order to determine which state's substantive law governs the dispute at hand, the court must determine which choice-of-law rule applies in this kind of case. Then, on that basis, it must decide which State's private law to apply. After the court has selected the applicable choice-of-law rule and has made the choice between the »competing« substantive law – in our illustration, Austrian or German law – it can proceed to determine the substantive outcome on the basis of the chosen law and the evidence presented by the parties.

2/11 Once a competent court determines the outcome of a given commercial litigation with an international element, courts in other states may need to apply the private international law rules which regulate the recognition and enforcement of foreign judgments.

2/12 Under these circumstances A might have reason to ask a court in France to enforce the judgment against B, for instance by seizing B's assets in France so as to satisfy the judgment rendered in Austria to secure payment of the damages due. If the judgment rendering court is located in a Member State, the issue of recognition and enforcement of that judgment in another Member State will be regulated by the

Brussels Ia Regulation and the Austrian judgment will almost certainly be enforced in France.

C. Forum shopping

2/13 At first glance, it might seem unnecessary to take step 2 in our scenario, that is to make a choice between the law of different states, since we had already determined that the courts in question had jurisdiction. Can we not assume that, for instance, the competent Austrian court will apply Austrian substantive law? The answer to that question is always rendered in the negative. We cannot make that assumption regarding the substantive law applicable to the merits of the dispute. When determining a dispute with an international element, such as parties from different states, a court will only apply its own procedural rules when internationally competent, but it may well apply the substantive law of a different country in order to resolve the merits of that dispute. In other words, even if a domestic court assumes jurisdiction, that court may find that a foreign law governs the substance of the dispute between the parties.

2/14 This illustrates an important concept in private international law: The issues of jurisdiction and applicable law are independent of each other and are governed by separate sets of rules. Of course, experience shows that some national courts tend to apply their own substantive law without any further consultation of the choice-of-law rules because their substantive law is the law the judges are most familiar with.

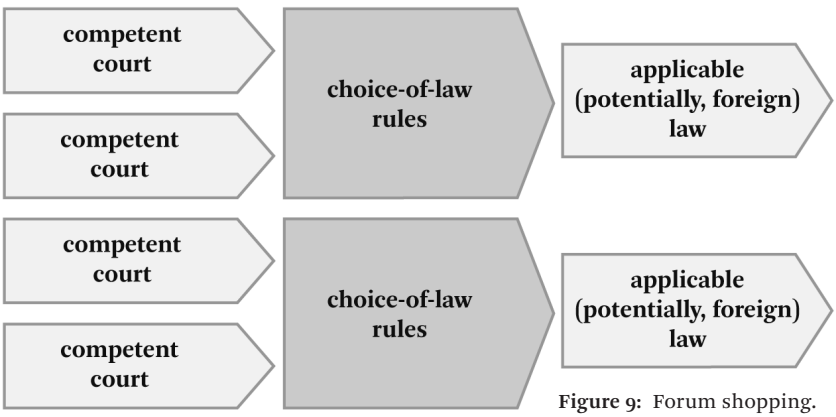

Figure 9: Forum shopping.

2/15 However, this approach disrupts international legal harmony and gives the (prospective) claimant an unfair advantage: Skipping the test of choice-of-law allows the claimant to choose a court and thereby the substantive law of a specific jurisdiction which favours him or her as it, for example, awards significant damages or has a particularly advantageous system of evidence. In other words, the claimant may sway the substantive legal entitlements to his or her own advantage and, accordingly, to the disadvantage of his or her opponents. If this were permitted, the law would not serve a neutral and predictable mediatory function between the parties and would in essence be unfairly biased against the defendant. The choice-of-law rules, commonly referred to as »meta-law« in that they are laws about law, prevent this kind of forum shopping by parties by rendering only one national legal system exclusively applicable to the case at hand regardless of where the claim is litigated and which court is deemed internationally competent (see no. 2/10, figure 8, above). By basing their decisions as to which law is applicable to cases with a foreign element on the same choice-of-law rules, all European courts in whichever national jurisdiction are thus ultimately referring to the same substantive law.

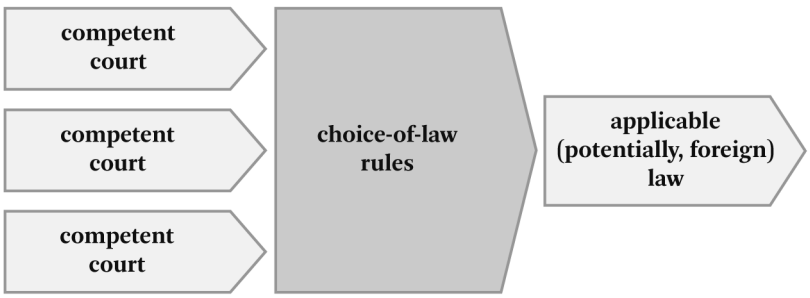

Figure 10: Application of choice-of-law rules irrespective of jurisdiction.

? What are choice-of-law rules and what are rules on international jurisdiction?

D. Cross-border contracts

Now that we have laid out the basic concepts of private international law, we move on to applying them to case studies. **2/16**

Two companies enter into a contract of sale. The seller A is domiciled in Austria while the buyer B is domiciled in the United Kingdom. According to the contract of sale, the English company is to buy 200 bottles of Austrian wine and the Austrian company is to deliver the wine to a specified address in the United Kingdom. The application of the CISG has been excluded in the contract (on the CISG, see no. 2/102 et seq., below). The Austrian company delivers the wine but the English company refuses to pay and argues that the wine is of sub-standard quality.

The Austrian claimant consults with you on two questions: Which court is competent to hear the action of A against B? Which law will be applied by this court?

The needs of the common European market have meant that the European legislator has been particularly active in the area of international jurisdiction. As early as in 1968 the Brussels Convention on Jurisdiction and the Enforcements of Judgments in Civil and Commercial Matters was adopted by the Member States of the European Community at that time and came into force in 1973. The Brussels Convention was subsequently amended by four accession conventions and was finally replaced (for fourteen of the then fifteen EC Member States) by Regulation 44/2001 on Jurisdiction and the Recognition and Enforcements of Judgments in Civil and Commercial Matters adopted by the EC Council in December 2000. The »recast« of the Regulation entered into force on 1 January 2015 (hereafter »Brussels Ia Regulation«). **2/17**

The Regulation, like the earlier Convention, lays down rules on direct jurisdiction, applicable by the court of first order to determine its own jurisdiction, and on the recognition and enforcement of judgments of other Member States of the European Union in which the Regulation applies. In contrast to the Convention, the Regulation is directly applicable in the Member States under art. 288 TFEU (see no. 1/27, above). According to art. 1, the Brussels Ia Regulation determines which courts of European Member States are competent in civil and commercial matters. **2/18**

2/19 The basic rule concerning direct jurisdiction is enshrined in art. 4 Brussels Ia Regulation which provides that »persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. »The Brussels Ia Regulation applies whenever the defendant is domiciled in a Member State regardless of whether or not the claimant is situated in the European Union.

The rationale of this long-standing rule in favour of the defendant's domicile was outlined clearly by the CJEU in 17.6.1992, C-26/91, Handte v. TMCS, ECLI:EU:C:1992:268, which noted that the rule reflects the purpose of strengthening the legal protection of persons established within a particular current »national« jurisdiction, and rests on the assumption that a defendant can usually best conduct his defence in the courts of his or her domicile.

Another reason for favouring the defendant over the plaintiff is that the defendant's assets are most likely at his place of domicile and enforcement against person or property can thus most easily be effected there. Thus, the rule tends to concentrate both adjudication of the merits and enforcement of the judgment in the same country, thereby avoiding unnecessary procedural complications.

2/20 As our defendant is an English company, the Regulation is prima vista applicable and the relevant provision is found in art. 4 Brussels Ia Regulation. However, before we apply art. 4 Brussels Ia Regulation to our illustration, it is useful to first have a closer look at the wording; specifically, the rule only mentions »persons«. Does it also pertain to companies? According to art. 63 Brussels Ia Regulation, this question can be answered in the affirmative and, thus, we are dealing here with a claimant with an Austrian domicile and a defendant with an English domicile. According to art. 4 Brussels Ia Regulation, the English courts would have jurisdiction in this matter and the Austrian company would thus have to bring proceedings in the United Kingdom.

2/21 An exaggerated preference for the defendant's domicile does not provide the most appropriate solution in all situations, actions and claims in cross-border cases as this takes only the defendant's interests into account. It seems odd to subjugate the interests of the plaintiff to those of the defendant in general and, accordingly, the Brussels Ia Regulation provides for particular alternative jurisdictions if the defendant

is to be sued in the courts of a state other than that of his or her domicile. In such cases, the plaintiff has the choice of court; none of the courts involved are permitted to override the plaintiff's choice on any grounds, which at times results in an advantage for the plaintiff as he or she may bring proceedings at his or her domicile. According to the European legislator, this freedom of choice was introduced in light of the existence, in certain well-defined cases, of a particularly close relationship between the dispute in question and the court where it might be most convenient to adjudge the matter. Some exceptions, providing that a person domiciled in one Member State may be sued in another Member State, are of a general nature and concern almost all kinds of civil disputes.

2/22 One exception to the rule on general jurisdiction above is of interest with regards to cross-border contracts such as the one in our illustration. According to art. 7 no. 1 lit. b first limb Brussels Ia Regulation a »person domiciled in a Member State may, in another Member State, be sued … in matters relating to a contract, in the courts for the place of performance of the obligation in question [and] for the purpose of this provision …, the place of performance of the obligation in question shall be … in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered …«.

2/23 The reason for this so-called special jurisdiction in art. 7 Brussels Ia Regulation is rooted in the fact that one of the aims of the Regulation is to identify the court which can most easily take evidence of facts. In many disputes arising from contracts it is necessary to determine whether or not the contract was properly performed. It is usually easier to take evidence for this at the courts of the Member State which is the place of performance.

2/24 This background leads us on to the definition of the »place of performance«. When the general aim is to take evidence at the specific place where the good is situated, it refers to that part of the contract which is the non-monetary performance. In our illustration, this would point to the Austrian courts as the sale of the wine was effected there. However, when the goods are delivered, according to art. 7 no. 1 lit. b first limb Brussels Ia Regulation, the all-important non-monetary performance is not the sale but instead the delivery of the goods, again with a view to ensuring the ease of taking evidence. Here, the place of performance in our example is in the United Kingdom and, ultimately, jurisdiction is thus vested in the English courts. This, of

course, is most unfortunate for our Austrian claimants as their choice of possible courts is not broadened; both general as well as special jurisdiction are vested in the English courts.

2/25 We can thus answer the first question in our example, namely, the courts of which Member States are internationally competent to adjudicate the case? According to art. 4 and art. 7 no. 1 lit. b first limb Brussels Ia Regulation the English courts are internationally competent to adjudicate the case.

2/26 To answer our second question – the applicable law – we need to distinguish between procedural and substantial questions and focus on the substance of the dispute, that is, the merits of the case at hand. In our illustration substantial questions would be, for instance, whether the quality of the wine was in accordance with the contract, whether the goods were provided on time and what purchase price the English company would be required to pay the Austrian company. Procedural questions, on the other hand, concern the composition of courts and the rules on taking evidence.

2/27 Procedural questions are always governed by the so-called lex fori. Lex fori refers to the domestic law of the competent court (with lex – meaning »law«, and fori – »of the court«). This means in essence that the competent court will apply its own rules of procedure. For instance, Austrian courts (if competent) must conduct proceedings in accordance with Austrian procedural rules; English courts (if competent) must conduct proceedings according to English rules and so on.

2/28 Substantive law governs matters of substance. Choice-of-law rules and the above-mentioned meta-law effect apply only to the choice-of-law of the substantive law and are called »lex causae«. Procedural law, as opposed to the substantive law, is determined by the »lex fori«. In our illustration, the lex fori is English law; the lex causae must be determined by applying the relevant choice-of-law rules. Here, the relevant conflict rules are part of EU law (see no. 1/27 et seq., above). They are contained within the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, the so-called Rome I Regulation. The Rome I Regulation thus determines which law governs the substance of disputes arising from contracts with a foreign element.

2/29 To determine our applicable law according to the Rome I Regulation we of course need to be sure that the Rome I Regulation is in itself applicable. According to art. 1 Rome I Regulation, which defines its

material scope, the Regulation applies in »situations involving a conflict of laws, to contractual obligations in civil and commercial matters«. The question is then according to which law the terms »civil and commercial matters« are to be defined, or in terms of private international law, how the term should be characterised.

Three main schools of thought on this question emerged in the course of the last century. The so-called lex fori theory was proposed by German and French writers, Franz Kahn (1861–1904) and Etienne Bartin (1860–1948) respectively. It has been the prevailing theory on the European continent and was, by and large, also adopted by English courts. According to this theory the process of characterisation should be performed in accordance with the domestic law of the forum: If the court has to characterise a conflict of laws rule, it should inquire how the corresponding or most closely analogous domestic law is characterised and apply that characterisation to the rule in question. Objections raised to the lex fori theory are that its application may easily result in a misinterpretation of the foreign law and render it inapplicable in cases in which the foreign law would apply it, and vice versa. Moreover, if there is no close analogy in domestic law, the theory simply does not work. A second approach argues that the process of characterisation should be performed in accordance with the lex causae, that is, the foreign internal law referred to by the conflict of laws rule itself. However, to say that the governing law dictates the process of characterisation is to argue in a circle, because how can we know what the governing law is until the process of characterisation is completed? Neither approach, however, is adequate for the classification of supra-national rules like art. 1 Rome I Regulation. If every Member State interpreted the concept of civil and commercial independently – whether by its lex fori or the foreign lex causae – the unified rules would be interpreted separately and, therefore, applied incoherently.

The academic Ernst Rabel (1874–1955) was the first to draw attention to this deficiency in 1931, suggesting instead a comparative law method of characterisation. According to this approach, conflict of laws rules should use conceptions of an absolutely general character, and these conceptions must be based on studies of comparative law, which extracts essential general principles of professedly universal application rather than principles based on, or applicable to, the legal system of one country only. Taking Rabel's approach, the rules in the Rome I Regulation – and, of course, in all other unified conflict rules – must ideally **2/30**

be regarded as independent concepts to be interpreted by reference to the objectives of the unified rules themselves and to the general principles stemming from the corpus of the national legal systems.

The CJEU does not follow any specific national systematisation or approach, whether that of the lex fori or lex causae, but stated in 14. 10. 1976, C-29/76, LTU v. Eurocontrol, ECLI:EU:C:1976:137 that »… the concept of civil and commercial matters must be given an autonomous meaning, derived from the objectives and schemes of the instrument and the general principles underlying the national systems as a whole«.

2/31 Regarding the term »civil and commercial matters«, the CJEU conducted a thorough analysis of the current solutions in the Member States concluding that »civil and commercial matters« includes all disputes where neither party to the dispute is a public body. This does not include disputes between a private person and a public authority arising out of acts by the public authority in the exercise of its powers; it would, however, cover disputes between such parties where the public body was not acting in terms of its official powers. Of course, this is an extremely simplified definition as any superficial study of the exclusionary list in art. 1 para. 2 Rome I Regulation reveals, but, nevertheless, it shall suffice for our matter at hand. Because no public body is concerned in our illustrative example, the Rome I Regulation is applicable.

2/32 Of all the rules in the Rome I Regulation the foremost is the rule expressed in art. 3 para. 1 Rome I Regulation in terms of which the law chosen by the parties shall govern a contract. Thus, the parties to a contract are free to determine the law which shall apply to their dispute. However, in our illustration, the parties have not chosen any law. Therefore, the applicable law must be determined in accordance with the choice-of-law rules of the Rome I Regulation.

2/33 In our illustration art. 4 Rome I Regulation applies. This rule embodies two main principles of the Rome I Regulation, namely the principle of the closest connection and the principle of characteristic performance. Unfortunately, the rule is not presented logically and so to understand this provision it is best read as follows: Paragraph 4 stipulates the main rule of any choice-of-law rule for contracts, namely that the contract shall be governed by the law of the state to which it is most

closely connected. According to paragraph 2, it is presumed that a contract is generally most closely connected to the country where the characteristic performer is located. Paragraph 3 makes clear that the rule of characteristic performance is merely a presumption designed to assist in identifying the closest connection which may be rebutted when a manifestly closer connection to another state exists.

Finally, and with a view to easy application in practice, paragraph 1 stipulates clear-cut choice-of-law rules for specific types of contracts, which are essentially descriptions of characteristic performances in specific contracts. In our illustration, we have a sale and, according to art. 4 para. 1 lit. a Rome I Regulation, »a contract for the sale of goods shall be governed by the law of the country where the seller has habitual residence.« The habitual residence of the seller in our illustration is in Austria and hence Austrian law is applicable. **2/34**

In conclusion, the dispute between the Austrian and English companies will be litigated in front of English courts, which will conduct the proceedings in accordance with English procedural law. As to the substance of the dispute, the English courts will apply Austrian law. **2/35**

What are procedural matters and what are substantive matters? Which private international rules address each of them?

What does the process of characterisation entail? How is such characterisation to be performed according to the comparative law method of characterisation?

?

E. Connecting factors

When a given private international law rule leads to the conclusion that a court in a given state is competent to adjudicate a private law dispute, that decision can usually be traced to the existence of a certain connection. These so-called »connecting factors« serve to provide a legally sufficient link between the forum state (and its courts) on the one hand and the circumstances of the particular case on the other. Similar connecting factors are also at work when a competent court in a given state applies the substantive law of the forum or any other state as a result of the choice-of-law rules. The following closer scrutiny of the role **2/36**

played by connecting factors might be helpful, as this aspect of conflict of laws provides the underlying core for literally all conflict of laws rules. We again make use of a real-life scenario. The facts are as follows.

A Swedish company and an Italian company enter into a contract of sale. According to this contract, the Italian company is to deliver scientific research vessels and the Swedish company will pay a specified purchase price. The Italian company shall deliver the scientific research vessels not to Sweden but to Finland. The contract contains neither a jurisdiction agreement nor a choice-of-law agreement. The Swedish company refuses to pay the purchase price and argues that the vessels are not in accordance with the specific terms of the contract. The Italian company consults you on two matters: Which court is competent to adjudicate? And, which law will be applied by this court?

2/37 As the defendant in this case is domiciled in a Member State (Sweden), the question of which court can adjudicate the dispute at hand is governed by the Brussels Ia Regulation. As there is no jurisdiction agreement in the contract, the provisions we have discussed in the first illustrations, artt. 4, 7 Brussels Ia Regulation, are applicable.

2/38 Article 4 Brussels Ia Regulation embodies the general jurisdiction. According to this provision, persons domiciled in a Member State shall be sued in the country of their domicile. With a view to the connecting factors and their application, we can break down the jurisdictional analysis of this provision into its three key component parts, namely the reference, the fact setting and the connecting factor. First, one must clearly identify the question that you wish to answer with reference to the conflict of laws rule at hand. Regarding art. 4 Brussels Ia Regulation this would be the international competence of the specific court, phrased in the provision as »shall be sued«. Second, one must establish whether the fact setting in the provision fits to the real-life fact setting. In art. 4 Brussels Ia Regulation the defendant must be domiciled in a Member State, phrased in the provision as »person domiciled in a Member State«. Third, the provision will provide for a connecting factor, that is usually a geographical connection to a state. In art. 4 Brussels Ia Regulation the connecting factor is the domicile of the defendant, which is phrased as »in the courts of [the person's domicile] that Member State.« In our case, the defendant is a Swedish company. For the present purpose, according to art. 63 Brussels Ia Regulation, the

defendant company is domiciled in Sweden. As a result, in accordance with art. 4 Brussels Ia Regulation, the Swedish courts have general jurisdiction in this case.

Let us now turn to art. 7 no. 1 lit. b first limb Brussels Ia Regulation providing for special jurisdiction for disputes arising from contracts. Breaking down this rule into its key components, you will encounter again the two-step approach from above: In para. 1 lit. a the reference is the international competence of the court seized, the fact setting the »performance of the obligation« – in other words, a contract – and the connecting factor the place where the obligation had to be performed. This connecting factor of the place of performance is then concretised by para. 1 lit. b first limb with the fact setting of a sale of goods, where the goods are to be delivered with the connecting factor of the place of delivery. **2/39**

Accordingly, the Italian claimant may opt for bringing proceedings at the place of performance. As to the sale of goods, this place of performance is defined as the place where the goods were delivered. In our case, the goods were delivered in Finland. Thus, Finland being the place of performance, it is up to the Italian company to decide whether to conduct proceedings in Sweden under art. 4 Brussels Ia Regulation or in Finland under art. 7 no. 1 lit. b first limb Brussels Ia Regulation. **2/40**

Whatever the choice of the plaintiff, the court must subsequently determine the substantive law applicable to the rights and obligations of the parties in this contractual context in order to adjudicate the merits of the claim, namely, Italian, Swedish or Finnish law. Clearly, there are several competent courts potentially available to the claimant. **2/41**

As we have already seen, if a dispute arises, the internationally competent court will apply choice-of-law rules in order to determine the applicable law. The need to determine one national substantive law assumes, of course, that there is a substantive conflict between the potentially applicable laws. For instance, were Finland, Italy and Sweden to all have the same law of sales domestically – providing, for instance, for identical remedies for a given sales contract breach – there would be no need to choose between the states' respective sales laws. **2/42**

Although most states continue to maintain individual solutions regarding domestic sales contracts, a uniform substantive solution has emerged with respect to international sales in the form of the 1980

Vienna Convention on Contracts for the International Sales of Goods (CISG, see no. 2/102 et seq., below). Since Italy, Sweden and Finland have the same law as regards international sales contracts, neither Swedish nor Finnish courts need to resolve a sales law conflict in order to reach a decision regarding our illustrative case dispute.

Later we will look in more detail at all questions concerning the CISG but for now it is enough to establish whether the CISG is applicable to our case or not. Article 2 lit. e CISG provides an answer in the negative: the CISG »does not apply to sales … of vessels.«

2/43 As there is no uniform substantive private law we need to consult the choice-of-law rules contained in the Rome I Regulation. As stated above, the pivotal choice-of-law rule is contained in art. 3 Rome I Regulation, and provides that the parties have the choice to apply a specific law. But our contract of sale does not provide for any such agreed choice of law. Indeed, the parties may not have given any thought to the matter at the time when the contract was concluded. In such a situation, the competent court will need to revert to the relevant default rule in the Rome I Regulation which designates a specific substantive contract law which the court is to apply; this default provision is set out in art. 4 Rome I Regulation.

2/44 Using our »reference, fact setting, connecting factor« pattern set out above, we can now take a closer look at the choice-of-law rule at hand. Under art. 4 para. 1 lit. a Rome I Regulation a contract for the sale of goods is governed by the law of the country where the seller has his or her habitual residence. Thus our reference is »the law applicable to the contract«, our fact setting the »sale of goods« and finally our connecting factor is the »habitual residence« of the seller. We now need to look at how the »habitual residence« of a company is to be determined under the Rome I Regulation. The answer is found in art. 19 Rome I Regulation which dictates that the habitual residence of companies is the place of central administration. Hence, our reference is the »habitual residence of a company«, our fact setting, »companies« and »all bodies, corporate or unincorporated« and the connecting factor the »place of central administration«.

2/45 As the habitual residence of our Italian company is in Italy, we can now answer both of the questions posed: The Italian company may sue either in Sweden under art. 4 Brussels Ia Regulation or in Finland under art. 7 para. 1 lit. b first limb Brussels Ia Regulation. Independent of

whether Swedish or Finnish courts decide the case, the law applicable to the substance of the dispute is to be determined in accordance with the Rome I Regulation; in terms of art. 4 para. 1 lit. a of the Regulation, the merits of the case will be decided according to Italian law.

What is a reference? What is a fact setting? What is a connecting factor?

What are the connecting factors of the private international law rules mentioned in this chapter so far?

F. Cross-border consumer contracts

2/46 When it comes to consumer claims against entrepreneurs, international jurisdiction – and thus also the applicable procedural law (see no. 2/8, above) – is determined in the European context by the Brussels Ia Regulation. The Regulation provides for an adjudicatory jurisdiction, supplementing the general jurisdiction of the defendant entrepreneur's habitual domicile; alongside the jurisdiction of the State where the obligation in question was to be performed – which usually coincides with the jurisdiction of the defendant's domicile (see no. 2/19 et seq., above) – the consumer has the right to sue the entrepreneur in the courts of the State where the consumer is domiciled and may be sued him- or herself at these courts insofar as the entrepreneur »directs« his or her commercial activity to that State and the contract falls within the scope of the activity (art. 17 para. 1 lit. c in connection with art. 18 Brussels Ia Regulation).

Such specific rules also exist in the provisions on the applicable law for consumer contracts laid down in art. 6 Rome I Regulation. According to recitals 7 and 24 of this regulation, they must be understood as consistent with art. 17 Brussels Ia Regulation; in the following we will predominantly discuss the question of international adjudicatory jurisdiction.

2/47 In light of the continuing growth in online commerce and the ubiquitous web presence of entrepreneurs, the debate has centred on the

phrase »directed to« the State where the consumer is domiciled in relation to their commercial or professional activity. The question arose whether an online presence was sufficient to satisfy this criterion and establish the competence of the courts in the State where the consumer was domiciled. Here, the CJEU handed down a landmark decision in this respect in 7.12.2010, joined cases C-585/08 and C-144/09, Pammer v. Reederei Schlüter and Alpenhof v. Heller, ECLI:EU:C:2010:740.

The first dispute in this case involved Mr Pammer – an Austrian resident, and the shipping company Reederei Karl Schlüter GmbH & Co. KG, a company established in Germany. Mr Pammer ordered a cruise from Italy to the Far East. He booked the voyage online for 8,510 €; a contract was concluded between the Mr Pammer and the shipping company (»voyage contract«). On the day of departure Mr Pammer refused to embark. The accommodation was far from what he had been promised online: Instead of a double cabin (for which he had paid), only a single cabin was available – and even there the air conditioning (or any other ventilation) did not work. Contrary to prior promise on the website, there was neither an outdoor swimming pool nor a fitness room, neither a working television nor seating or lounging facilities on deck. The cruise ship was (more or less) a freighter. Mr Pammer sought reimbursement of the sum which he had paid for the voyage; the shipping company refunded a part of the sum he paid for the trip (3,216 €). Mr. Pammer brought an action before an Austrian court for the payment of the balance of 5,294 €. The Austrian Supreme Court (Oberster Gerichtshof) decided to stay proceedings and referred to the CJEU for a preliminary ruling (see no. 4/49, below) as follows: Does the »voyage contract« constitute package travel for the purposes of art. 17 Brussels Ia Regulation? If the answer is yes: Is the fact that an intermediary's website can be consulted on the internet sufficient to justify a finding that activities are being »directed« to the Member State of the consumer's domicile within the meaning of art. 17 para. 1 lit. c Brussels Ia Regulation?

The second (joined) dispute also concerns an online booking. In »Alpenhof/Heller«, Mr Heller – a German citizen – reserved a number of rooms for a period of a week in January 2008 through the website of the Alpenhof GesmbH, a company which operates a hotel with the same name located in Austria. His reservation and the confirmation thereof were effected by email. After his stay in the hotel Mr Heller did not pay having found fault with the hotel's services. The Hotel Alpenhof GesmbH sued Mr Heller for the provision of said hotel services before an Austrian court. The Oberster Gerichtshof was not sure on how the

CJEU would answer the previously submitted case »Pammer/Reederei Schlüter« and – the court's judgment being dependent upon the findings given by the CJEU – stayed proceedings and referred the following question to the CJEU: Is the fact that a website of the party with whom a consumer has concluded a contract can be consulted on the internet sufficient to justify a finding that an activity is being »directed« within the meaning of art. 17 para. 1 lit. c Brussels Ia Regulation?

The CJEU held that – within the meaning of art. 17 para. 1 lit. c Brussels Ia Regulation – any activity presented on a professional's website (or on that of an intermediary) can be considered to be »directing« its activity to the Member State of the consumer's domicile when it is apparent from those websites and the professionals' overall activity that the professional was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with the consumer. To underpin this finding, the court did not formulate any (more) abstract definition of the legal phrase »directed to«, but instead provided a list of indicia it considered suitable to determine how the activity in question is »directed«: Although the pure accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled and the (mere) mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established will not establish jurisdiction at the consumer's domicile; the following matters – the list of which is not exhaustive – are capable of constituting evidence from which it may be concluded that the professional's activity is directed to the Member State of the consumer's domicile, namely: **2/48**

- the international nature of the activity,
- mention of itineraries from other Member States for going to the place where the trader is established,
- use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language,
- mention of telephone numbers with an international code (for instance, »+43«),

- outlay of expenditure on an internet referencing service (e.g. google) in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States,
- use of a top-level domain name other than that of the Member State in which the trader is established (for instance, ».com« instead of ».at«), and
- mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.

2/49 In practice the consumer, who bears the burden of proof due to the derogation from the jurisdiction of the defendant's domicile (art. 4 Brussels Ia Regulation, see no. 2/19, above), will usually submit that he or she took notice, first, of the professional's marketing activity directed at his or her State (typically the website), and in consequence concluded the contract because of the »directed« marketing activity.

The dispute in CJEU, 17.10.2013, C-218/02, Emrek v. Sabanovic, ECLI:EU:C:2013:666 was different: A German consumer, Mr Emrek, bought a car in France where it was possible to prove that the communication between the professional car retailer, Mr Sabranovic, and the consumer Mr Emrek was not linked to the retailer's website, but to a recommendation given by an acquaintance of the consumer.

Mr Emrek, as a consumer, concluded a written contract for the sale of a second-hand motor vehicle with Mr Sabranovic at the latter's premises. Mr Emrek only discovered the defendant's website after the contract was concluded, and then tried to rely on it in order to justify the jurisdiction of his domicile under art. 17 para. 1 lit. c Brussels Ia Regulation. Given the design of the website, there was no doubt that it was (also) directed at foreign clients in the sense of the relevant rule. As the website had not in any way provided the motive for the consumer to conclude the contract, however, and instead the consumer had travelled abroad on his own initiative and only learned of the website after the contract was concluded, there was, strictly speaking, no link between the entrepreneur's activity in that sense and the actual contract. In other words, the contact between the defendant professional and the claimant consumer could not be traced back to the entrepreneur's website. The crux of the matter was, therefore, whether a restrictive causality requirement applied, or whether the mere co-existence of two elements not linked as cause and effect was sufficient to justify

the jurisdiction of the consumer's State of domicile in accordance with art. 17 para. 1 lit. c Brussels Ia Regulation.

To cut to the end of the case, the CJEU rejected a causation requirement. Since the consumer must be protected as the weaker party in contracts with professionals, he or she must not be exposed to difficulties in proving his or her case, such as when the professional disputes causation. This might dissuade consumers from suing in their domestic courts, ultimately weakening their protection. **2/50**

For a court to be internationally competent to hear a claim of a consumer at his or her domicile, must the consumer have concluded the contract before or after he or she has discovered the website?

Assuming that the directed activity of the professional must be one of the causal reasons for the consumer to conclude a contract, what would have been the result in CJEU, 17.10.2013, C-218/02, Emrek v. Sabanovic, ECLI:EU:C:2013:666?

G. Cross-border delicts

If a party takes steps to commence litigation in a non-contractual matter, such as a tort or a delict, a two-step process similar to international contract disputes is likely to be involved: First, the court must determine whether it has international jurisdiction to adjudicate the dispute. Then, assuming the court has competence, it must determine the law to be applied to the substance of the dispute. **2/51**

To fully understand conflict of laws relating to non-contractual obligations, the German case of RGZ 54, 198 from 1903 (in simplified form) will be used as illustration.

On the French side of the river Rhine (which demarcates the border between France and Germany) a Frenchman is hunting birds. Shortly thereafter a German farmer on the German side of the river is found apparently shot by a French hunting bullet. The grieving German widow seeking damages requires the answers to our two questions:

?

(1) Which court is competent to adjudicate? and,

(2) which law will be applied by this court?

1. International jurisdiction

2/52 In the context of modern law, the Brussels Ia Regulation provides the answer to the question of international jurisdiction. First, the general rule of art. 4 Brussels Ia Regulation also applies to non-contractual obligations. As a French hunter will most likely be the defendant in our case, the widow could commence proceedings in a French court. As in our contract case above, there are exceptions to this general rule relevant to non-contractual obligations: Art. 7 no. 2 Brussels Ia Regulation stipulates that in matters relating to torts, delicts or quasi-delicts, a person domiciled in a Member State may sue in another Member State »in the court of the place where the harmful event occurred«.

2/53 The application of this rule is unproblematic in cases where the harmful conduct, that is the action eventually leading to the damage, and its result, that is the damage, are located in the same country. However, the wording is not easily applied to cases like our hunting illustration (i.e. a so-called »delict over a distance«) as it is unclear whether the courts of the Member State where the wrongful action took place (France) or where the resulting damage arose (Germany) have jurisdiction over the matter.

⚖

The CJEU dealt with such a matter in the case 30.11.1976, C-21/76, Bier v. Mines de Potasse d'Alsace, ECLI:EU:C:1976:166 where a horticultural company in the Netherlands, depending largely on the waters of the Rhine for irrigating its plants, suffered from the pollution of the river's water by the discharge of saline waste from a potash mine in France.

2/54 The CJEU held that the provision must be understood as covering both the place where the damage occurred and the place where the event giving rise to the damage took place and, as a rationale, referred to the respective equal proximity of both courts to the wrongful conduct or the infringement sustained. Hence, the answer to our first question is that the defendant may be sued, at the choice of the plaintiff, either

in the courts at the place where the damage occurred or in the courts where the event giving rise to it occurred. These two options are not exclusive and do not deprive the plaintiff of his or her right to sue in the country of the defendant's domicile pursuant to the general provision.

The rule may also pose problems in multi-state torts, such as cross- **2/55**
border defamation, where the damage occurs not only in one but in (many) different countries.

The implication of this on jurisdictional issues was demonstrated by the case of CJEU, 7.3.1995, Shevill v. Presse Alliance SA, ECLI:EU:C:1995:61 Here, a libel action was brought by an English woman against the publisher of a French newspaper with 0.1% distribution in the United Kingdom. Vesting jurisdiction in both the courts of the State where the harm occurred and at the place of wrongful conduct became highly problematic: First, as it was unclear whether a particular court was at the place where the harm occurred or where the wrongful conduct took place. And second, because at first glance the solution might amount to a situation where the victim had the right to sue in courts of both jurisdictions, that is, suing the publisher in France and England respectively, and each time in respect of the full damage.

The CJEU became aware of the possibility of forum shopping and in **2/56**
response, introduced certain limitations on the choice of jurisdiction of the plaintiff: First, the court draws a distinction between the initial injury and consequential losses, and it refuses to permit a plaintiff to sue in the courts of any place where he or she has merely suffered consequential loss arising from injury of his or her protected right that was sustained elsewhere. Hence, only the primary infringement of the protected right is relevant for the assessment of the competent court under art. 7 no. 2 Brussels Ia Regulation. Second, this rule is extended to secondary victims who may only sue in the jurisdiction where the primary victim was harmed. Finally, with regard to the libel case above, the court held that the publisher could be sued at the place of his wrongful conduct, that is, at his establishment, for all harm caused by the defamation or before the courts of each country where the publication was distributed and caused damage. However, in the latter case, the courts of each country have jurisdiction solely in respect of the damage caused within their own territory.

? In the initial hunter example, where can the widow bring proceedings according to artt. 4 and 7 no. 2 Brussels Ia Regulation?

2. Choice-of-law rules

2/57 In Europe, the law applicable to torts has traditionally been determined by national choice-of-law rules. In some Member States, these national rules are judge-made whereas in others, the choice-of-law rules have been laid down by statute. It is worth reiterating the basic concepts from the start: When only the rules on international jurisdiction are applied, the court applies its substantive national law, that is, its lex fori and the result of the case thus depends on in which jurisdiction the case is brought (forum shopping, see no. 2/13 et seq., above).

2/58 This set up has increasingly been considered unsatisfactory and, in particular during the past century, several attempts at the elaboration of a unified legal act on the law applicable to non-contractual obligations on a European level were undertaken. This changed with the enactment of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation). The Rome II Regulation covers all non-contractual obligations in civil and commercial matters having multi-state connections of the nature and extent that implicate the laws of more than one state. The scope of the Regulation is, however, restricted by a list of specific exclusions and the application of its general rule in art. 4 para. 1 Rome II Regulation is further limited by a number of special rules covering product liability, unfair competition, environmental damage, infringements of intellectual property rights and industrial action. Furthermore, violations of privacy and rights relating to personality are excluded.

2/59 According to the general default rule of art. 4 para. 1 Rome II Regulation, the applicable law is the law of the country in which the harm occurs »irrespective of the country in which the event giving rise to the damage occurred«. The European legislator held that such »principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States« though it admitted that the »practical application of this principle … varies«.

In our initial hunting case, the result would be the application of German law.

Consider art. 7 Rome II Regulation which applies to environmental damage. Where this Article has to be applied, the plaintiff has the choice between the application of the law where the damage occurred (in accordance with art. 4 para. 1 Rome II Regulation) and the law of the State where the tortious act occurred. **2/60**

Could you apply this rule to the case in 30.11.1976, C-21/76, Bier v. Mines de Potasse d'Alsace, ECLI:EU:C:1976:166 (see above no. 2/52)? Why or why not? Which law is applicable? ?

H. Cross-border road traffic accidents

By far the most common cross-border torts concern road traffic accidents because cars have become a rather common good and people use their cars to go abroad, for instance on holiday or for business purposes. As road traffic accidents feature a rather special regime with regard to the rules on applicable law, this will be our last and our (probably) most difficult discussion on private international law. **2/61**

1. International jurisdiction

As earlier, we will start by ascertaining which courts are internationally competent to hear a claim in cases of a road traffic accident abroad (or an accident in Austria involving a foreign driver). Again, the above-discussed rule on general jurisdiction applies (see no. 2/19, 2/37, above): The defendant driver will be sued in the country of his or her domicile. **2/62**

Additionally, art. 7 no. 2 Brussels Ia Regulation, stipulating that, in matters relating to torts, delicts or quasi-delicts, a person domiciled in a Member State may sue in another Member State »in the court of the place where the harmful event occurred«, applies here: Usually, under this heading, the courts in the State where the road traffic accident occurred have international jurisdiction.

As vehicles in Europe are subject to compulsory insurance, the claimant will usually not direct his or her action against the defendant driver but his or her liability insurer. We call this an action directe. For **2/63**

this scenario the CJEU case 13.12.2007, C-463/06, FBTO Schadeverzekeringen v. Odenbreit, ECLI:EU:C:2007:792 has major relevance.

The facts of the case are as follows: The claimant, who is habitually resident in Germany, suffered an accident in the Netherlands and brought a direct action in Germany against the other party's insurer, domiciled in the Netherlands. Here the question arose whether German courts have international jurisdiction for this claim on the basis of artt. 13 para. 2, 11 para. 1 (b) Brussels Ia Regulation.

2/64 The CJEU ruled that the reference in art. 13 para. 2 Brussels Ia Regulation to art. 11 para. 1 lit. b of that regulation was to be interpreted as meaning that the injured party might bring an action directly against the insurer before the courts in the Member State where the injured party was domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State. In other words, the claimant may sue the defendant driver's insurer at the courts of his or her home country.

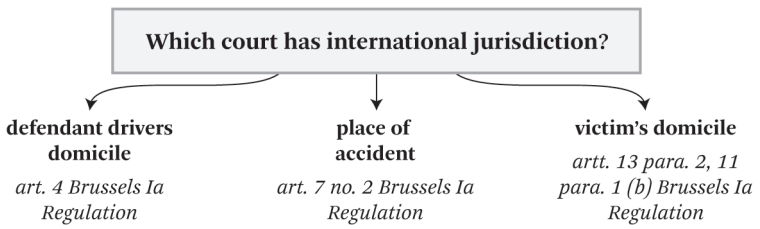

Figure 11: International jurisdiction in cases of road traffic accidents.

2/65 As a result, the victim of a road traffic accident can bring his or her claim in three different courts: Either at the domicile of the defendant driver under art. 4 Brussels Ia Regulation or at the place where the road traffic accident occurred under art. 7 no. 2 Brussels Ia Regulation or, finally, at the courts of the victim's domicile under artt. 13 para. 2, 11 para. 1 (b) Brussels Ia Regulation.

2. Choice-of-law rules

As you are well aware, such a situation may very well lead to forum shopping (see no. 2/13 et seq., above) which is (usually) prevented by choice-of-law rules rendering only one national legal system exclusively applicable to the case at hand regardless of where the claim is filed. Thus, we would turn to the above-mentioned Rome II Regulation (see no. 2/58 et seq., above) as road traffic accidents are non-contractual obligations in civil and commercial matters as envisaged by the Regulation. **2/66**

However, before applying the Rome II Regulation, its art. 28 must be consulted. **2/67**

Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

Article 28 para. 1 provides that the Rome II Regulation does not hinder the application of international conventions to which one or more European Member States were parties at the time when the Regulation was adopted, and which lay down conflict rules relating to non-contractual obligations. But, according to art. 28 para. 2 Rome II Regulation, as between Member States, the Regulation takes precedence over conventions concluded exclusively between two or more of them. **2/68**

One of the relevant conventions is the Hague Traffic Accidents Convention of 4 May 1971 on the Law Applicable to Traffic Accidents. The parties to this Convention include the following European Member States: Austria, Belgium, the Czech Republic, France, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovakia, Slovenia and Spain. Other parties to that Convention are inter alia Belarus, Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Norway, Serbia, Switzerland and Ukraine. **2/69**

Since the Convention is thus not in force in European Member States only (see art. 28 para. 2 Rome II Regulation), the effect of art. 28 Rome II Regulation is that in the Member States which are already party to the Convention, and in absence of denunciation, the Hague Road Traffic Accidents Convention will prevail over the Rome II Regulation.

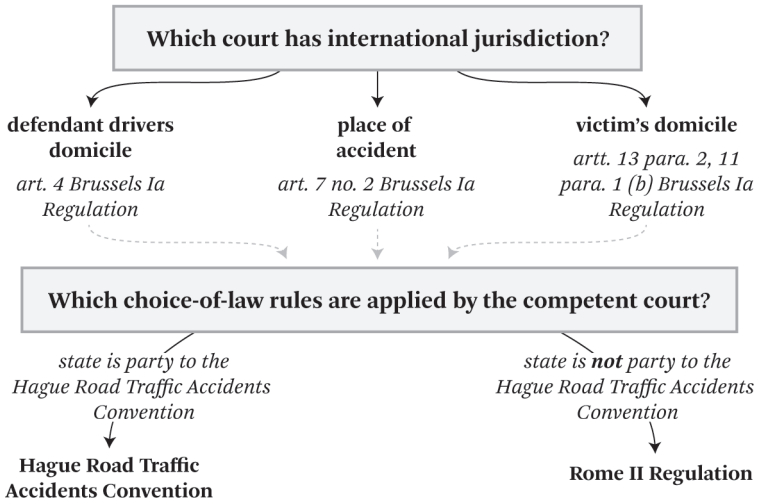

Figure 12: The choice-of-law rules between Hague Road Traffic Accidents Convention and Rome II Regulation.

2/70 Depending on where the claimant brings his or her claim, either the Rome II Regulation or the Hague Traffic Accidents Convention will apply: Where the court seised lies in a state which has ratified the Hague Traffic Accidents Convention (such as Austria), the Convention applies. If the claimant brings his or her claim in a EU Member State which has not ratified the Hague Traffic Accidents Convention (for instance, Germany), the Rome II Regulation applies.

2/71 Considering the fact that a number of EU Member States have not ratified the Hague Traffic Accidents Convention, the question is why some EU Member States refused to be party to the Convention. The easy answer is that the convention provides for rather out-dated and quite difficult rules.

2/72 The main choice-of-law rule of the Convention is found in its art. 3: The law applicable to claims for non-contractual damages is the law

of the country in which the accident occurred. However, a significant number of exceptions are laid down in art. 4 Hague Traffic Accidents Convention: First, the law of the country in which the accident occurred does not apply but rather the law of state where the vehicle is registered if only one vehicle is involved in the accident and this vehicle is registered in a state other than that where the accident occurred. Accordingly, the law of the state of registration is applicable to determine liability towards a victim who is a passenger and whose habitual residence is in a state other than that where the accident occurred (art. 4 lit. a) first hyphen Hague Traffic Accidents Convention), or towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the state of registration (art. 4 lit. a) second hyphen Hague Traffic Accidents Convention). However, where there are two or more victims, the applicable law (either law of accident state or law of registration state of vehicle) is determined separately for each of them.

2/73 Under the Hague Traffic Accidents Convention, where two or more vehicles are involved in an accident, the law of the registration state is only applicable if all vehicles are registered in that same state. Finally, if one or more persons outside the car(s) at the place of the accident are involved, the law of the registration state(s) is only applied if all these persons have their habitual residence there (art. 4 b) Hague Traffic Accidents Convention).

2/74 Compared to this, the Rome II Regulation seems almost ridiculously easy: According to the default rule in art. 4 para. 1 Rome II Regulation, the applicable law is the law of the country in which the harm occurs, that is the law of the country where the accident occurred (see 2/68, above). If both parties are habitually resident in the same country, the tort is governed by the law of that country (art. 4 para. 2 Rome II Regulation). If no such common habitual residence exists, the tort is governed by the law at the place of the accident. Finally, art. 4 para. 3 Rome II Regulation provides the only exception in favour of the law of another country which has a manifestly closer connection with the tort.

Figure 13: The full picture of road traffic accidents in private international law. ▹

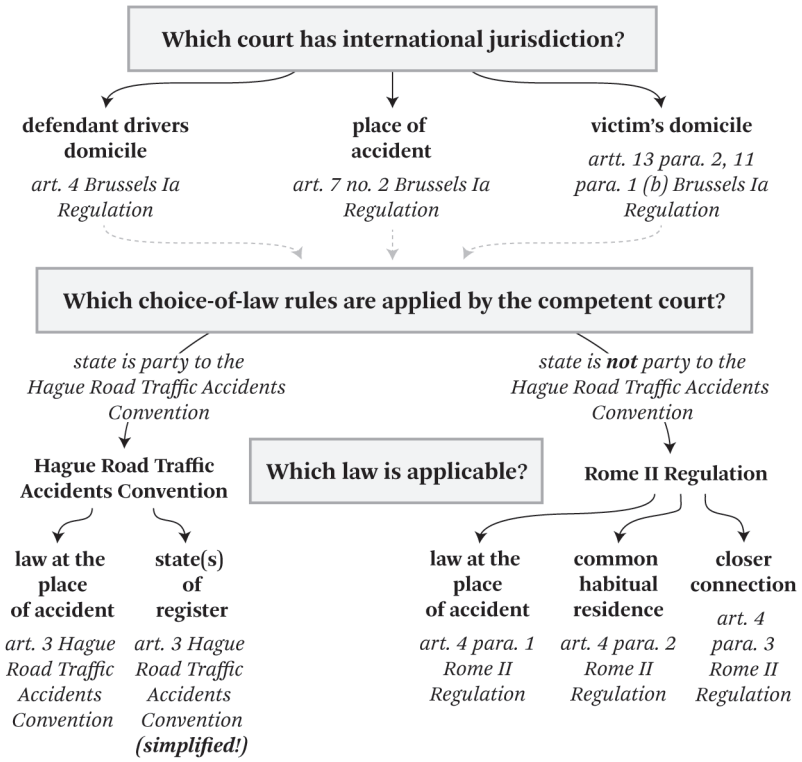

Figure 13: The full picture of road traffic accidents in private international law.

2/75 To sum up, in cases of road traffic accidents, a number of international courts could have international jurisdiction. Each of these courts may either apply the Hague Traffic Accidents Convention or the Rome II Regulation (if a EU Member State court), thereby prescribing the application of different national substantive laws. To illustrate this finding, let us have a look at a final case.

A Polish driver with his habitual residence in Germany crashes his car – which is registered in Germany – into a tree in Poland. His passenger, an Austrian resident, suffers various injuries and sues the liability insurer of the driver at the driver's habitual residence in Germany. The liability insurer pays a (out of court) lump sum compensation amount of some thousand Euros.

In the original case, German courts had international jurisdiction under art. 4 Brussels Ia Regulation. As Germany has not ratified the Hague Traffic Accidents Convention, the Rome II Regulation applies. According to art. 4 para. 1 Rome II Regulation, the law at the place of the accident is applicable. This law is Polish law and accordingly the insurer made a payment under Polish law. 2/76

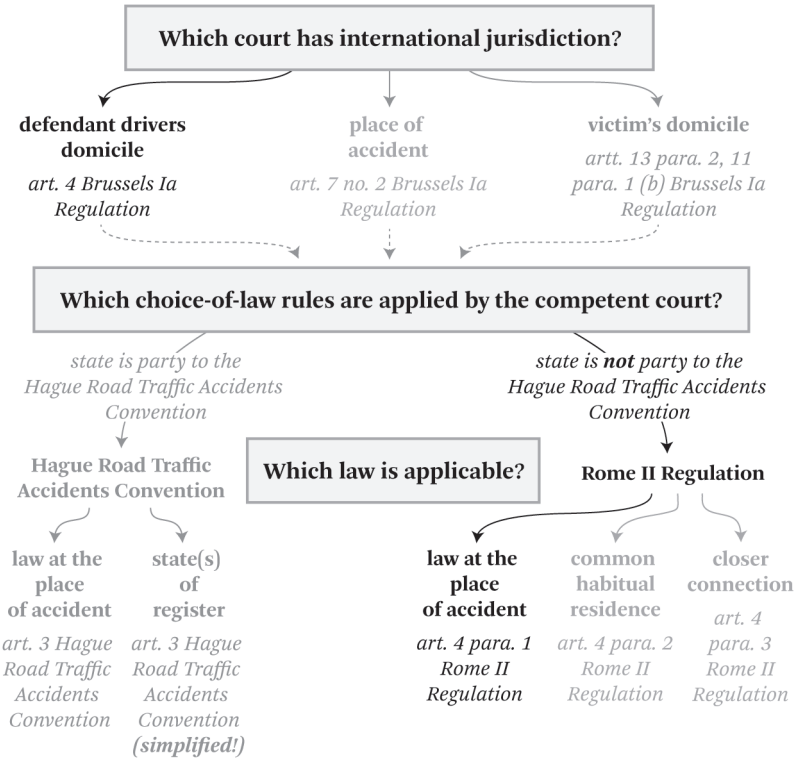

Figure 14: German court's perspective.

When the driver moves to Austria, this picture changes. Austrian courts now have international jurisdiction under art. 4 Brussels Ia Regulation. The same applies (even without a change of residence of the driver) if the passenger, who is a habitual resident of Austria, had brought her claim in an Austrian court according to the judgment of the CJEU 13.12.2007, C-463/06, FBTO Schadeverzekeringen v. Odenbreit, ECLI:EU:C:2007:792 under artt. 13 (2), 11 (1) (b) Brussels Ia Regulation. 2/77

2/78 As to the applicable law, Austria is a signatory state of the Hague Traffic Accidents Convention. According to art. 3 Hague Traffic Accidents Convention, the law at the place of the accident applies as a general rule. However, the law of the state of the registration of the car (Germany) applies according to art. 4 Hague Convention, where the passenger had his habitual residence outside the state of the accident (outside Poland). Hence, art. 4 lit. a) first hyphen Hague Traffic Accidents Convention applies, the result being that German law is applicable – and the original payment has no influence on that case, with the overall result that the driver's liability insurance has to pay (yet again).

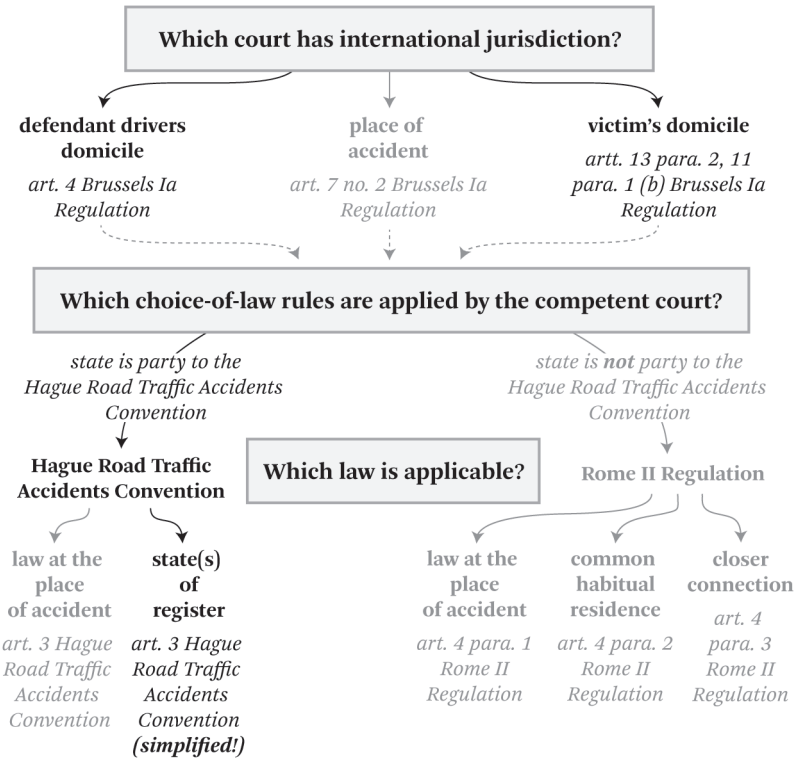

Figure 15: Austrian court's perspective.

II. Comparative private law

Comparative private law is a discipline that addresses substantive private law rules of foreign states and compares them. In this chapter the importance of this discipline in private international law cases is reiterated; additionally three important purposes will be outlined in detail. **2/79**

Before you start studying this chapter please be sure to review no. 1/52 et seq. above.

A. Ascertaining the contents of foreign private law rules

In the introduction we outlined the basics of private law rules internationally, namely, that in principle all countries have their own rules of family law, law of succession, property law, contract law, tort law, etc. Each country's rules differ more or less from the rules of another country. The choice-of-law rules dealt with in no. 2/6 et seq., above, tell us which of these national private law rules a domestic court must apply in a cross-border case. According to these rules, the domestic courts may be required to apply the substantive rules of a foreign country instead of those of their own domestic law. But how do the Austrian courts know about the content of the private law rules of the foreign country? How can domestic courts gather information, for instance, concerning which remedies are available to the buyer of a defective good under French law? How can the courts obtain information on Indonesian law in the case of a car accident? **2/80**

Under §§ 3 and 4 of the Austrian IPRG, Austrian courts have the duty to determine the contents of the applicable foreign private law and to apply them in the same manner as they would be applied by a court of that particular foreign country. In determining the contents of the foreign legal rules, the Austrian court may be assisted by the Austrian Ministry of Justice, which usually requests the Austrian Embassy in the particular foreign country to provide the necessary documents and information to assist the court in ascertaining the content of the foreign law and determining its application. The Austrian embassy in the foreign

country usually contacts a local domestic lawyer of confidence who in turn provides the necessary information about the particular foreign law available. The embassy then conveys this information to the Austrian Ministry of Justice who in turn passes it on to the Austrian court. The Austrian court may additionally request the assistance of expert opinions.

Comparative legal researchers also serve as a source of information on foreign legal systems via their written work. Based on this information, a judge may be in a position to ascertain, for example, the relevant French or Indonesian legal rules necessary for the case before him or her without requiring the assistance of the Ministry or an expert witness. The first step for a judge seeking to apply a foreign law is thus to look to relevant scholarly comparative legal writing.

B. Legal families

2/81 Starting with Zweigert and Kötz, comparative law researchers have identified specific groups of legal systems the members of which are more closely related to one another than to other groups of legal systems (»Rechtskreislehre«). They distinguish between common law and civil law systems, and within civil law systems, between, for instance, Romanistic, Germanistic and Scandinavian groups (see no. 2/83, below).

2/82 Common law systems include the English, US-American, Australian and Canadian private law systems. Common law systems historically derive most of their legal rules not from statutes, but rather from court decisions, which were understood as the main sources of private law. Civil law systems, on the other hand, such as most of the European continental systems, derive their legal rules from statutes: among this statutory law the codifications of private law are of pivotal importance, for instance the Austrian »ABGB«, the German »Bürgerliches Gesetzbuch« (BGB), the French »Code Civil«, the Italian »Codice Civile«, the Spanish »Código Civil«, the Swiss »Obligationenrecht« (OR) and the Swiss »Zivilgesetzbuch« (ZGB) and the Dutch »Nieuwe Burgerlijk Wetboek« (NBW). Court decisions are not considered to be sources of law in civil law systems as civil law courts are largely competent only to interpret and apply the law of the codifications and statutes and not to create new legal rules themselves.

The civil law systems of Europe can be further divided into three »legal families« or »Rechtskreise«: the »Germanic« family, including the private law systems of Austria, Switzerland and Germany; the »Romanic« family, including the private law systems of France, Belgium, Luxembourg, the old Dutch Code, Italy, Spain and Portugal; and the »Nordic« family including the private law systems of Iceland, Norway, Finland, Sweden and Denmark. **2/83**

The historically different sources of law in common and civil law systems respectively are the root of a number of basic differences between the methodology and the legal culture of common and civil law systems today. For instance, common law lawyers make use of a so-called »inductive« method to determine a just solution to a case. In deciding a case, the courts first look to similar previously decided matters for guidance (»stare decisis«). If the earlier case is regarded as significantly different from the matter before them, they will render a »new«, different decision. Thus, they gradually develop rules by deciding cases. Civil law courts, on the other hand, make use of the so-called »deductive« method. That is, they take a general rule laid down by the legislator and apply it to the case before them. They »deduce« their single case decision from statute with a rigid syllogism, whereby the legal rule is the major concern and the facts, the minor concern. **2/84**

These different approaches are, however, gradually converging. Nowadays, common law systems also contain a considerable number of private law statutes. This development is strengthened by the legislation of the European Union with respect to the English private law systems and driven by the fact that statutes provide a certain degree of clarity and certainty that is necessary in many fields of private law and cannot be provided by court decisions alone. Similarly, civil law systems no longer derive their private law rules from the provisions of statutes and codifications alone but instead, to an increasing extent, from court decisions too. Thus, their decisions serve as »quasi« sources of law. In the future, it is expected that the European Union will bring about an even stronger »rapprochement« of the common and civil law systems. **2/85**

The distinction between common law and civil law systems can only partially explain the private law reality in the states of the world. First, there are additionally a number of private law systems which are unrelated to either of the two groups, for instance, the partially religious private law of Arabic countries, spheres of African law, Chinese **2/86**

law and the law of other Asian countries. Second, many of the former colonies of European states imported the colonialist's law. This is the case, for instance, with Dutch law in Indonesia and British law in India and various African countries. Such »legal transplants« also took place outside of colonisation; for instance, Swiss private law significantly influenced Turkish law, British common law has been to some extent exported to Israel and the German BGB to Greece and Japan. In the »receiving« countries, older sources of law, customs and traditional attitudes towards law also exist, overlapping with the transplanted rules to create a blend of rules and attitudes. This mixture of different rules and traditions lends itself to different practical outcomes as compared to the country that exported their Codes or private law systems.

2/87 A further heterogeneous group of countries have characteristics of both the common law and civil law systems; we speak of »mixed« or »hybrid systems«. The Nordic countries, South Africa, Quebec (in Canada), Louisiana (in the US) and Israel belong to this group.

2/88 Accordingly, the distinction between different groups of legal systems offers only a starting point; practitioners and comparative researchers will need to dig deeper to determine the precise legal rules and practices of the legal system under examination.

C. Interpretation of choice-of-law rules

2/89 The provision of information about foreign legal systems is not the only assistance that comparative law provides in international cases. Additionally, comparative law aids in the interpretation of rules of private international law (see no. 2/30, above), the preparatory work for the unification of private law rules and the uniform interpretation of such rules (see no. 1/66 et seq., above).

D. Uniform law and its interpretation

2/90 The need for uniform private law arises from the variety of solutions to common problems offered by various national laws and the inability of private international law to always find a middle ground. This is most evident in international trade and transport issues but also arises in other fields of private law.

2/91 International traders are thus not able to predict the outcome of potential legal disputes in the face of no internationally uniform source of law. As we have discussed earlier (see no. 2/41, above) several states' courts may be potentially competent to adjudicate the dispute and may arguably interpret the choice-of-law rules differently with the result that the law applicable may be less predictable than initially assumed. But even when the parties have taken all necessary precautions by, for instance, electing which law is applicable to their contract, non-contractual aspects of their dispute may still be governed by a different law. Even once it has been established which law will apply, standard difficulties such as limited access to foreign law or the knowledge of the statutory language may still persist. The lack of legal certainty creates in itself a risk in cross-border transactions and thus undeniably constitutes a barrier to international trade and exchange.

2/92 If uniform legal rules exist in a certain field these legal hazards can be avoided. The parties of an international transaction will know from the outset that the uniform rules apply to their (prospective) legal dispute. It is easy for them to ascertain the contents of the uniform legal rules as these are usually translated into many languages. Courts in all countries in which the uniform legal rules are in force will apply them. This may explain why international practitioners and researchers find uniform private law rules for international cases extremely desirable.

2/93 How does comparative law assist the creation of uniform law? Outside the European Union, which provides various possibilities for creating uniform law (see no. 1/38, above and no. 3/23 et seq., below), the most important sources of internationally uniform private law are international conventions. However, it is difficult to reach unanimous agreement on the text of the uniform rules of a convention. It is, however, imperative that the greatest number of countries agree to these rules as the success of a convention depends on its acceptance and later ratification by these countries (see no. 3/22, below). The more contracting countries a convention has the more effective it is and the more »uniform« the law in the particular field becomes.

2/94 As a result, the texts of international conventions are usually based on extensive comparative studies of the national rules of the prospective contracting states in a particular field. These studies are normally conducted by specialised working groups of international organisations.

Examples of international organisations that prepare uniform private law are:

- UNCITRAL (UN Commission on International Trade Law, New York/Vienna; established by a General Assembly Resolution in 1966),
- UNIDROIT (private organisation, Rome),
- ICC (International Chamber of Commerce, Paris),
- Hague Conference (The Hague, Netherlands).

2/95 When, for instance, a convention on the international assignment of claims is prepared by an international organisation, the organisation first gathers information on how the assignment of claims is currently addressed in the different national systems of private law. Usually, representatives of the respective countries who assist the work of the international organisation provide this information. It then compares and evaluates the different national solutions and looks for a common denominator that would be acceptable to all countries. The international organisation then formulates a draft text proposing the possible common solution, which is subsequently subject to comments and criticism by the representatives of the different countries. The draft will be amended until the majority of countries are satisfied that their concerns have been addressed. The final text of the convention is ratified by the politically competent institutions of the respective countries (see no. 3/23 et seq., below). Through this ratification process the uniform rules enter into force in the ratifying countries.

2/96 As noted above (no. 1/67, above) as with all other legal texts, the rules of the uniform law convention have to be interpreted. Unlike domestic legal rules, however, the convention cannot be interpreted in the light of a single country's legal system alone. Comparative studies are crucial to ensure uniform interpretation.

E. Other purposes of comparative law

2/97 Apart from aiding in the solutions to multinational private law cases, comparative law has broader uses. Studying a foreign legal system and comparing it to your own often helps you to properly understand the strengths and weaknesses of the rules of your own system. Comparative law therefore increases the quality of legal studies (see no. 1/61, above).

Comparative law might also be a useful device for national legislators. If they intend to reform particular national rules, they may find it helpful to assess how other private law systems deal with the same issue. The legislator can thus learn about alternative solutions and study the practical impacts of different rules and, thereby, make a well informed decision on how to reform their own law (see no. 1/61, above). **2/98**

III. Uniform private law

A. Binding and non-binding sources of Uniform Private Law

International conventions that have entered into force are binding sources of law for the participating states and are applied independently of the intention of the individual parties. Aside from the binding character of conventions, other non-binding sources of law exist and can be deliberately incorporated into a contract by the parties. For instance, documentary credits, guarantees, arbitration agreements, etc. can be made subject to the rules of uniform customs and practices published by the ICC (International Chamber of Commerce) in Paris; arrangements of transporting sold goods and the passing of the risk can be included in terms of the INCOTERMS, and a wide array of model laws and recommendations published by UNCITRAL and other international organisations can be included. Despite their non-binding character, these non-binding rules greatly influence the practice of international commerce, as a great number of parties choose to include them into their contracts. **2/99**

Finally, internationally uniform customs – being neither part of a convention nor a non-binding legal text of an international organisation – may also significantly influence cross-border commerce. These rules are often referred to as »customs of international trade« or »lex mercatoria« (law merchant) of international trade. It is alleged that these customs are binding sources of law as they are applicable even if parties do not make express reference to them in their contract. **2/100**

Do not confuse the »customs of international trade« (lex mercatoria) with the »customary public international law« in no. 1/7, above and

no. 3/18, below. The »customs of international trade« are created by the long-standing practice of private actors in international commerce, and are binding only on these private actors on the international trade market.

In stark contrast »customary public international law« is created by the long-standing practice of states and is binding on states only.

The customs of international trade are part of uniform private law, whereas the customary law binding states is part of public international law.

2/101 However, the validity and the contents of the lex mercatoria are widely disputed among national courts and among commentators. This lack of clarification regarding whether a national court will accept certain international customs or not is highly unsatisfactory. As a result, international parties often opt for a non-state arbitration procedure when a dispute requires resolution in terms of which party-appointed private arbitrator will settle the disputes outside formal court proceedings. Arbitrators are usually more willing to apply all international customs in a certain branch of trade or in the whole of international trade. The international parties, therefore, can usually rely on the application of international customs or lex mercatoria in an arbitration procedure.

B. The UNCITRAL Sales Convention (CISG)

2/102 From the perspective of cross-border commerce, uniform private law is enormously advantageous (see no. 2/42, above). As mentioned above, the number of internationally uniform sources of substantive private law is steadily increasing. Alongside the CISG many other uniform sources of private exist, but the CISG remains the most pivotal. Thus, as an introduction to uniform private law, we begin with an examination of this Convention.

In July 2013, an Austrian firm A that produces a special type of computer chips that are combined with other hardware concludes a contract of sale with a Portuguese manufacturer M, who needs the seller's products for his high tech machinery. The contract provides that A will

deliver 10,000 units of XY (name of the goods) within 14 days after the conclusion of the contract, and that the price of € 80,000,– is due one month after the delivery of the goods. The contract contains the following stipulation of the applicable law: »The law applicable to all parts of this contractual agreement is the Austrian law«.

16 days after the conclusion of the contract, M realises that A's goods have not yet been delivered. M needs A's products to prepare the opening of a new section of his plant. For every day that the opening of the plant section is delayed, M suffers damages of € 2,000,– due to additional expenses and € 10,000,– b y loss of profits.

Which law is applicable to the legal questions raised? What remedies does M have?

1. Scope of application

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is one of the most successful private law conventions in existence. Currently, it has 83 parties including all European countries; the number is constantly growing with new members joining every year. **2/103**

The recent ratification status can be found online at <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

As discussed above, the CISG was prepared and drafted by the UNCITRAL which has its headquarters in Vienna and New York. The UNCITRAL has also produced a number of other important conventions and model laws in the field of commercial (private) law. The uniform sales rules of the CISG replace the rules on contracts of the Austrian ABGB and the Austrian UGB entirely if the seller and the buyer are located in different countries and the buyer is not a consumer. **2/104**

The CISG rules apply automatically when the seller and the buyer have their places of business in two different contracting states. A stipulation of the CISG rules by the parties is not necessary for their application. The CISG also applies when the parties are not located in two contracting states provided that the rules of private international law lead to the application of the law of a contracting state. **2/105**

2/106 In our above illustration Austria is a party to the CISG whereas Portugal is not. As a result, we have to determine whether the choice-of-law rules stipulate the law of the contracting state, here Austrian law. As the parties have not chosen any law applicable pursuant to art. 3 Rome I Regulation (see no. 2/32, above), art. 4 para. 1 lit. a Rome I Regulation applies. As the agreement between A and M is a sale, the contract will be governed by the law of the country where the seller has his or her habitual residence which, in our case, is A's habitual place residence and, accordingly, Austrian law (see no. 2/34, above). As a result, the CISG is applicable.

2/107 If the parties do not want the CISG to apply to their contract, but rather a domestic legal system, they must state this expressly in their contract. For that purpose, it is not sufficient to include a term providing »The Austrian law shall apply to our contract«. Austria is a signatory state of the CISG and, therefore the CISG is part of Austrian law and, indeed, supersedes the rules of the ABGB. In other words, the CISG is Austrian law. As a result, the judge will apply the CISG in the absence of the parties' express exclusion of its application in favour of the application of some other law. In order to exclude the CISG, the parties would have had to provide a more precise formulation, such as »The Austrian ABGB rules shall apply to our contract« or »The CISG shall not apply to our contract: The law applicable to the contract shall be the law of the Italian Codice Civile.«

2/108 The CISG does not apply to sales contracts in which the buyer is a consumer purchasing the goods for personal, family or household use, unless the seller neither knew, nor ought to have known that the goods were bought for any such use. The CISG is also not applicable to service contracts and contracts to manufacture goods if the party who orders the goods supplies a substantial part of the materials necessary for the production of the goods. Both alternatives are not applicable to our case and, as an interim result, the CISG is applicable.

2. Scope of application of the CISG

2/109 The CISG applies to

- the formation of the sales contract (artt. 14–24 CISG),
- the duties of the parties under the sales contract (artt. 30–37, 53–60 CISG),
- the passing of the risk (artt. 66–70 CISG),

- the duty of the buyer to examine the goods and to give notice to the seller of any lack of conformity within a reasonable time (artt. 38–44 CISG) and, last but not least,
- all legal consequences that are triggered by a breach of contract (artt. 45–52, 61–65 CISG).

For instance, the buyer's remedies in case of the seller's breach of contract mentioned in artt. 45 et seq. CISG would include specific performance (art. 46 para. 1 CISG), delivery of substitute goods (art. 46 para. 2 CISG), repair (art. 46 para. 3 CISG), avoidance of the contract (art. 49 CISG), price reduction (art. 50 CISG), damages (artt. 74 et seq. CISG), and restitution of the price already paid after avoidance or price reduction (artt. 81 et seq. CISG). **2/110**

The CISG does not, however, apply to questions of validity of the contract, such as the capacity of the parties to conclude the contract, representation or agency, the violation of mandatory law or of good faith and mistake (with the exception of mistake regarding the characteristics of the goods). Moreover, the CISG does not apply to the passing of property. **2/111**

3. Rules for breach of contract

A comparison of the rather complicated Austrian sales law under the ABGB and the CISG rules reveals one of the major achievements of the CISG. Whereas, under the ABGB, a distinction is drawn between delay, »initial« and »subsequential non-performance«, »positive« misperformance and »non-performance due to initial defect« the CISG provides for only one general category: the »breach of contract«. This general category features only two subdivisions, namely »fundamental breach of contract« and »non-fundamental breach of contract«. The complicated doctrinal jungle of national legal rules is thus replaced by a clearer, simpler concept for both parties and judges alike. **2/112**

As remedies available under the CISG differ between a fundamental breach and non-fundamental breach, it is best to start our discussion of art. 25 CISG by providing a definition of these two concepts. According to this provision, a breach is fundamental »if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract«. **2/113**

The text of art. 25 CISG is, of course, only a vague circumscription that must be further interpreted by the courts. Recent court decisions **2/114**

show that the notion of »fundamental breach« is construed rather narrowly. For instance, the breach is not necessarily fundamental if the seller delivers goods which the buyer cannot utilise because they lack an important characteristic that was part of the contractual agreement. However, if the goods are completely worthless and cannot be resold by the buyer, this does amount to a fundamental breach. Further, if the goods are unusable only for the buyer, but could be utilised by other people, the buyer is required to sell the goods and demand a price reduction and/or damages from the seller. In this case the breach will not be considered fundamental.

2/115 This narrow conception of a fundamental breach can be explained or justified by the exceptionally high costs of transport that are usually incurred by the restitution of goods in international trade. In the case of a fundamental breach of contract (art. 25 CISG) by the seller, the buyer has the following remedies:

- the right to demand delivery (art. 46 para. 1 CISG),
- the right to demand the delivery of substitute goods (art. 46 para. 2 CISG),
- the right to demand repair of the goods (art. 46 para. 3 CISG),
- the right to demand price reduction (art. 50 CISG),
- the right to declare the contract null and void (art. 49 CISG),
- the right to claim damages (artt. 74 et seq. CISG), and
- the right to claim restitution of the price already paid (artt. 81 et seq. CISG) as a consequence of price reduction (art. 50 CISG) or avoidance (art. 49 CISG).

2/116 The buyer may choose any of these remedies according to his or her preferences. However, the choice is limited by various factors. The buyer cannot, for example, have the same detriment remedied twice or claim remedies that are contradictory by their character; the buyer cannot, for instance, demand price reduction (art. 50 CISG) and damages for the lower value of the goods (art. 74 CISG) at the same time or claim specific performance and avoid the contract at the same time.

2/117 In the case of a non-fundamental breach of contract by the seller, all the above-mentioned remedies are available to the buyer save two: He or she cannot claim the delivery of substitute goods according to art. 46 para. 2 CISG nor can he or she avoid the contract according to art. 49 CISG as these are the only two remedies that result in re-transport of the goods back to the seller (see no. 2/115, above).

Moreover, in cases of a non-fundamental breach, the CISG stipulates a priority of repair in favour of the seller. If the defective goods can be repaired and the repair does not create an unreasonable burden or delay for the buyer, the buyer must agree to repair the goods within a reasonable time period. Accordingly, the buyer may only resort to price reduction, restitution or damages if the seller does not repair the goods within that reasonable period of time or if the seller declares that he or she will not repair the goods. Even if the seller repairs the goods in time, the buyer can, of course, claim all the damages that were caused to him by the delay. **2/118**

It should be noted that further conditions to the buyer's remedies apply. This includes **2/119**

- an examination of the goods according to art. 38 CISG »within as short a period as is practicable in the circumstances« and
- notice of their lack of conformity to the seller according to art. 39 CISG »within a reasonable time after he has discovered it or ought to have discovered it«.

If the buyer does not examine the goods and/or does not give notice of the defects of the goods to the seller within the time periods prescribed, he or she cannot base any right or remedy on the lack of conformity of the goods, no matter how poor the state of the goods is. In essence, the buyer forfeits all his or her rights if he or she fails to examine and notify the seller of the defects timeously. However, according to art. 44 CISG, the buyer retains his or her right to price reduction and to claim damages except for loss of profit if he or she has a reasonable excuse for failure to give due notice. **2/120**

International court decisions determine the length of these two periods according to the circumstances of the particular case. The regular length is about one to two weeks for examination and two weeks for notice; that is, three to four weeks as a maximum total period. If the goods are perishable or the defects of the goods are evident to the buyer on receiving delivery, the period of examination may only be one to two days and the period for notice may accordingly be much shorter too. If the defects are difficult to determine, for instance when technical expertise is required, the period of examination may be extended by two weeks. **2/121**

In most cases it is not sufficient to simply state that »the goods are defective«, as art. 39 CISG requires that the notice must »specify the **2/122**

nature of the lack of conformity«. This means that only a sufficiently precise notice in respect of the kind of defect discovered by the buyer will be effective.

2/123 If the seller does not deliver defective goods but, rather, there is a delay in delivery, the buyer may declare the contract null and void. However, he or she may

- fix an additional period of time for the delivery of the goods (art. 47 CISG) and
- if the seller does not deliver the goods within that additional period of time or if he or she declares that he or she will not deliver within that period, the buyer may declare the contract avoided (art. 49 para. 1 lit. b CISG).

2/124 However, if the contract stipulates delivery on an exact date and the delivery is not effected accordingly, the buyer can declare avoidance without fixing an additional period of time. The same applies where the seller has declared that he or she will not deliver at all.

2/125 Unlike for instance, Austrian rules of contractual damages, the CISG rules of damages for breach of contract (artt. 74–79 CISG) do not require any fault on the part of the breaching party. The breaching party is liable for all foreseeable damage suffered by the other party as a consequence of the breach (art. 74 CISG). The only exception to this, stipulated in art. 79 CISG, is if the breach was »due to an impediment beyond his control and he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or overcome it or its consequences«. Such impediments are events like the outbreak of war, a riot, a natural catastrophe, or an import or export ban issued by the state authorities. The mere fact that the supplier of the seller delivers defective goods without the fault of the seller does not constitute an impediment in the sense of art. 79 CISG.

2/126 Thus the legal requirements of a claim of damages under the art. 74 CISG are as follows

- the occurrence of damage to the claimant,
- the breach of a contractual duty by the defendant,
- the causation of damage by the breach of that particular duty, and
- the foreseeability of the damage for the defendant.

2/127 A defendant may prove that the breach of his contractual obligation was due to an impediment beyond his or her control in the sense of

art. 79 CISG. Only if this is successfully proven will he or she not be liable for the damage caused by his or her breach. In all other cases compensation is due for all the losses the claimant has suffered as a consequence of the breach including lost profits.

Coming back to our illustrative case above, we may now answer the questions raised. As already discussed, the CISG is applicable. As a result of the two-day delay, M's opening of the plant section is delayed and he suffers damage amounting to € 2,000,– and a loss of profits of € 10,000,– per day. As the delay itself is unlikely to be seen as fundamental, only the remedies according to art. 46 para. 1 CISG and art. 74 CISG are available to M. As a result M can demand performance from A and claim damages for the breach of contract in the amount of a total € 24,000,– for damage and lost profits. **2/128**

To consolidate our understanding of the application of the CISG, we shall modify our illustration above to a more real life scenario. **2/129**

A finally delivers the goods. M's employees immediately unpack them and start to install them into the machinery. After one week of testing, the employees report to M that the machinery cannot be set to work due to an unexplainable defect in the hardware delivered by A. After a day of discussion with the computer experts of his company M informs A of the alleged defects of the goods by fax, exactly ten days after the delivery of the goods. The next day, A sends the following statement by fax: »The products were free of any defects when sent to you. Your machinery is defective and is therefore not compatible with our products. In any case, the discussion about the defects of XY is obsolete as you have not rendered timely notice of the defects. Ten days exceeds the statutory time period within which you were required to give us notice of any defects regarding our products. Hoping that you will soon be able to get your machinery started. Yours sincerely, A.«

After receiving the statement, M approaches a lawyer and a computer expert to further investigate the case. They establish that the XYs do not have a certain quality that was part of the product description in the sales contract. The XYs therefore cannot be used in combination with M's machinery. A repair of the XYs is possible, but it would be very expensive, amounting to 40 % of the contract price. The 10.000 XYs are, however, not entirely worthless. They could be resold with relative ease to other manufacturers who do not need the special quality the XYs lack.

What remedies does M have?

2/130 As in the previous illustration, the CISG is applicable to this contract (see no. 2/108 et seq., above). The crucial question in this illustration is then whether the breach of the contract is fundamental. According to art. 25 CISG (see no. 2/113 et seq., above), the breach is fundamental if it results in detriment to the buyer that substantially deprives him or her of what he or she was entitled to expect under the contract, unless the seller was not able to foresee such a result.

2/131 Two possibilities for advice are possible here. As a defence lawyer you may argue that, according to recent court decisions, the term »fundamental breach« is narrowly construed and, thus, the facts of the particular case cannot be considered as a fundamental breach. According to art. 39 CISG, the remedies available to M are then dependant on whether or not he examined the goods and gave timely and precise notice of their defects (see no. 2/119 et seq., above). Here, just ten days have passed from delivery until the notice and the referral to the lack of compatibility is sufficiently precise. As an interim result A's objection may not be taken into regard when assessing M's remedies. Consequently M has a right to demand repair, price reduction and damages.

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The result above is based on the assumption that the breach of contract was non-fundamental. What are M's options if you were to argue for a fundamental breach?

Chapter 3

Public International Law

I. Purposes and development of public international law

A. The historical development of public international law

Before studying this chapter, please repeat the initial orientation on public international law in no. 1/1 et seq., above.

The traditional system, which is the basis of today's system of public international law, is built on the assumption that the nation-state is the primary actor. The modern nation-state is a relatively recent product of political development in Western Europe. It can be traced back to the time of the Renaissance and Reformation, the expansion of trade in the fifteenth and sixteenth centuries, and the European »discoveries« of the New World. Intellectually, the doctrine of sovereignty and the idea of the secular, territorial state are intimately associated with the creation of the »modern« system. Of course there were well-organised political units in Europe prior to this period and great empires had existed for millennia in China, Japan, India, Africa, Southeast Asia and the Middle East. These empires interacted with other societies and, hence, there were systems of law in place that pre-dated »modern« international law. Today, even though the majority of the more than 190 states worldwide are non-European, the contemporary system of public international law is based on the European model which has developed, roughly speaking, over the past four centuries. **3/1**

Some commentators perceive this Western European orientation and origin of public international law as highly problematic. They contend that the contemporary public international law system is a continuation

of Western colonialism and imperialism which offers little understanding of non-Western and non-European countries, in particular the developing countries or the so-called »Third World«.

3/2 With the growth of a number of independent states in the fifteenth and sixteenth centuries, the process of formation of customary rules of public international law based on the usages and practices followed by states in their mutual relations was initiated. The influential fact was that by the fifteenth and sixteenth centuries, jurists had begun to consider the evolution of a community of independent sovereign states. They thus began contemplating different problems regarding the law of nations, realising the necessity of a body of rules to regulate certain aspects of the relations between such states. Where no established customary rules existed, these jurists were obliged to fashion working principles by reasoning or analogy. They had recourse to precedents of ancient history and to the semi-theological concept of the »law of nature«, a concept which for centuries exercised a profound influence on the development of public international law. The greatest of the early writers on public international law was the Dutch scholar, jurist, and diplomat Hugo Grotius (1593–1645) with his systematic treatise »De jure Belli ac Pacis«. One central doctrine in his treatise was the acceptance of the »law of nature« as an independent source of rules of the law of nations, apart from custom and treaties. The Grotian »law of nature« was to some extent a secularised version, rooted primarily in the dictates of reason and the rational nature of men as social human beings. It went on to become a potent source of inspiration to subsequent jurists and to the doctrine of public international law.

3/3 In the eighteenth century, there was a growing tendency among jurists to seek the rules of international law mainly in custom and treaties, and to relegate to a minor position the »law of nature« or reason as source of principles. Scholars who attached primary or significant weight to customary and treaty rules were known as »positivists«. In the nineteenth century international law further expanded. This was due to a number of factors, including the further rise of powerful new states both within and outside Europe, the imposition of European civilization overseas (colonialism), the modernisation of world transport, the greater destructiveness of modern warfare, and the influence of new inventions. These factors heightened the urgent need for the international

society of states to develop a system of rules by which the conduct of international affairs could be regulated in an ordered manner. There was remarkable development in the law of war and neutrality and a significant increase in adjudications by international arbitral tribunals during the century. Additionally, states acquired the habit of negotiating general treaties in order to regulate affairs of mutual concern.

3/4 Other important developments took place in the twentieth century. The Hague Conference of 1899 and 1907 established the Permanent Court of Arbitration and the Permanent Court of International Justice was set up in 1921 as an authoritative international judicial tribunal, subsequently succeeded in 1946 by the present International Court of Justice in the Hague. Additionally, there was the creation of permanent international organisations whose functions were in effect similar to that of a world government of sorts, seeking to promote the interests of peace and human welfare, such as the League of Nations and, following the traumatic experiences of World War II, its present successor – the United Nations Organisation (UNO). Most remarkable has been the widening scope of international law, which has extended to cover, by multilateral treaties or conventions, not only every kind of economic or social interest affecting states, but also fundamental rights and freedoms of individuals.

B. Alternative views of public international law

3/5 When comparing the chapter on public international law to other fields of law you have already studied in the course of your first semesters you will notice that the rules of public international law have a somewhat special characteristic that distinguishes them from all other fields of law. For example, they seem to lack precision; they seem to be in a constant state of development and discussion which makes it very difficult to pin down what the law demands from the legal actors; they do not seem to really direct the conduct of states; they often cannot be directly enforced and seem to invite breaches by legal actors; and it is sometimes hard to distinguish mere political deliberations from legal rules of public international law. In essence, the rules of public international law might leave one with the uneasy feeling that they are simply too vague for proper comprehension. Some critics have thus raised the questions of whether public international law really has the character

of law and why it should be binding on sovereign states at all. In other words, is public international law »law« at all or merely politics?

3/6 There are two traditional explanations to the binding force of public international law: The »positivists« contend that states have consented to be bound by public international law and are thus bound by force of their consent (express consent to treaties and acquiescence in customary law). The adherents of »natural law« (like Grotius and many jurists of public international law after him) believe in the pre-existence of a set of rules – also including the rules of public international law – that originates from the commands of God, or later on in a secular form, from the demands of reason. Accordingly, states are bound by public international law rules because they are compelled to do so by God or by force of the nature and reason of mankind.

3/7 The New Haven School of law rejects both the positivist and the natural law approaches to public international law. The adherents of this school contend that the concentration on the formulation and application of »rules« of public international law makes us blind to the real nature of the problems that are to be solved by public international law, that is, the real problems that stand behind the »rules«. In their opinion, the really important questions in this field concern power and politics. They, therefore, propose a »policy-oriented« approach to public international law, which they distinguish from traditional »rule-oriented« approaches. The broad outlines of this policy-oriented approach include:

- the establishment of an observational standpoint;
- the formulation of problems;
- the delimitation of the focus of inquiry;
- the explicit postulation of public order goals; and
- the performance of intellectual tasks.

3/8 The adherents of the New Haven School contend that, in approaching international legal problems on a global scale, it is essential to first take the standpoint of an observer. They criticise what they regard as the usual standpoint of public international law, that is, the primacy of a particular group, namely the prosperous and powerful nations in the world. Rather, they contend the appropriate observational standpoint is that of the perspective of the citizens of the world community which is inherently linked to the future of mankind as a whole. They recommend that both the scholarly inquirer and the established decision-

maker should take a standpoint as remote from parochial interests and cultural biases as possible to enable them to ascertain and clarify common interests of the active participants in the different world communities. This perspective in turn influences every other aspect of related inquiries including how problems are defined, what goals are postulated, and what intellectual skills are employed.

3/9 Recognising the important bearing of the formulation of problems, the New Haven School has developed an economical and comprehensive way of categorising problems to ease study through time and across community boundaries. It seeks to make problems operational and manageable by adopting a set of value categories borrowed from ethical philosophies and other normative specialists: respect (freedom of choice, equality, recognition), power (making and influencing community decisions), enlightenment (gathering, processing, and disseminating information and knowledge), well-being (safety, health, comfort), wealth (production, distribution, the consumption of goods and services and control of resources), skill (acquisition and exercise of capabilities in vocations, professions and the arts), affection (friendship, intimacy, loyalty and positive sentiments), and rectitude (participation in forming and applying norms of responsible conduct). This comprehensive set of values can be characterised as representing the basic values of human dignity or of a free society.

3/10 Admittedly, the propositions and suggestions of the New Haven School are somewhat abstract and difficult to grasp. What do they actually suggest? You will notice that none of the five elements of their policy-oriented approach mentions the category of law. They do not concern themselves with the question of whether the rules of public international law are rules of law or not. They see the rules of law as an instrument of policy for promoting a preferred social order; the law and legal rules are not an end in themselves but rather dynamic, adjusting to reflect the policies of decision-makers. The key, then, is to focus on the appropriate policy and value decisions rather than on the content of changeable rules.

3/11 In an article in the Stanford Law Review (42 [1990] 811, 833 et seq.), Phillip R. Trimble, another US-American critical of public international law, writes: »A quick look at the ›rules‹ of international law shows why governments love international law. Contrary to the realist/idealist view of law as a restraint on unruly governments, international law confirms much more authority and power than it denies .... The rules

of international law are accordingly very congenial to governments. They mostly justify or legitimate the practical exercise of state power.« Trimble criticises traditional »rules« of public international law (he doubts that they are rules in the legal sense) as attributing too much power to states and legitimating the free exercise of this power, while conversely giving too little attention to other concerns including the interests of private persons and citizens, the common interest of the community of citizens as described by the New Haven School and the comprehensive set of values of mankind mentioned above.

To what extent are the rules of public international law different from legal rules in other fields (criminal law, private law, constitutional law, etc)? What are the important features of a rule or norm which qualify it as »legal« or »law«?

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Which theory do you prefer – natural law or positivism? Why should a state not be bound without its consent? What is the basis for natural law – whose god or whose moral or political system?

Do you think that the criticism by the New Haven School and Trimble is justified? Are power and politics the real nature of public international law? Is contemporary public international law really not in the interest of the citizens but rather in the interest of the states and political elites? If you share their criticism or parts of it: how could public international law be improved?

II. Public international law and Austrian domestic law

3/12 Having studied some of the intellectual foundations of public international law, let us now turn to more practical questions such as: the relationship between domestic Austrian law and the sources of public international law, the role and rank of customary public international law as part of the Austrian legal system or rather as an independent source of law and finally, the role of Austrian state institutions in the conclusion of an international treaty and its ratification.

3/13 There are two concepts explaining the relationship between the nature of public international law and domestic law. The concept of »dualism« contends that public international law and domestic law are two separate, different legal systems which co-exist in the realm of law. According to the concept of »monism«, there is only one legal system: one school of monism views public international law as domestic law in as much as it cannot come into existence without the assistance of domestic law whereas the other school of monism contends that domestic law is nothing more than a special form of public international law as public international law is superior to domestic law and is the basis and foundation of the existence of domestic law. If one shares the view of »monists«, either accepting that public international law is per definition domestic law or that domestic law is per definition public international law, one needs to address the further issue of how public international law becomes part of the domestic legal system and how it can be applicable in the domestic legal system.

3/14 Only the dualistic approach raises the question of how public international law can be valid under the domestic legal system. There are three possible answers to this question: First, the rule of public international law may be assimilated into the domestic legal system by a statutory act of transformation performed by a domestic state institution, normally the parliament. Second, states and their governments are involved in the creation of public international law rules (state practice, conclusion of a treaty by executive organs of the state). They also have authority to create domestically valid law by giving their consent to the creation of public international law. The rule of public law is then automatically incorporated into domestic law (»adoption«). There is no need for a transformation statute. Domestic courts have to apply the rules of public international law once they are in force in the public international law arena. According to a third theory, the rules of public international law are neither absorbed into domestic law by an act of transformation nor automatically incorporated into the domestic system (adoption) but remain independent rules of public international law. The rules of public international law only become applicable in the domestic legal system via an order of application.

3/15 One of the key differences between the first and second theories (according to which the rules of public international law are transformed into norms of domestic law) and the third theory (according to which the rules remain rules of public international law) is that once the rule

has become a domestic rule it can be amended and repealed like any other norm of domestic law by, for instance, the enactment of a domestic statute to this effect. This change, of course, only takes effect within the domestic system, not within public international law and the state effecting this change will accordingly be in breach of its duty under the international treaty. According to the third model, the national legislature cannot change the rule of public international law by passing a statute. The rule remains a rule of public international law and can only be changed by means of public international law, for instance, by concluding an amended treaty among the signatory states. The national institutions can only apply the rules of public international law, but they cannot change them in the same way as they can change a domestic rule.

3/16 Moreover, the third theory results in difficulties in ranking the rules of public international law vis-à-vis the national rules. If a domestic statute cannot change the rule of public international law, is the latter thus superior to the domestic statute, even if it addresses matters that are usually regulated by ordinary domestic statutes? According to the theories of transformation and adoption, the rule of public international law becomes part of the domestic legal system and thereby assumes the rank of a regulation, an ordinary statute or a constitutional statute. But the rule of public international law can itself declare its own supremacy over domestic law.

As mentioned in no. 1/79, above, this is the case in European law. The treaties of the EU (TEU and TFEU) always have supremacy over the rules of domestic law – no matter according to which theory they are applied in the domestic system.

3/17 The Austrian approach makes a distinction between the rules of customary international law and the rules of international treaties.

A. Customary public international law

3/18 According to art. 9 para. 1 B-VG (Austrian Constitution, Bundesverfassungsg), »[t]he generally recognised rules of international law are regarded as integral parts of Federal law«. This renders customary public international law part of Austrian federal law. No special act of trans-

formation is necessary. Courts and administrative authorities are thus automatically required to apply customary public international law. Within the Austrian legal system, the rules of customary law have the rank of an »ordinary« domestic statute.

3/19 Customary rules of public international law originate from usages or practices which have evolved under one of three sets of circumstances. First, diplomatic relations between states – acts or declarations by statespersons, opinions of legal advisers to state governments, bilateral treaties, and press releases or official statements by government spokespersons may all constitute evidence of usages followed by states; second, practice of international organisations – the practice of international organisations, whether by conduct or declarations, may lead to the development of customary law concerning their status, powers and responsibilities. The International Court of Justice, for example, based its opinion that the United Nations had international legal personality partially on the practice of the UN in concluding conventions. Third, state laws, decisions of state courts, and state military or administrative practice – a concurrence of state laws or judicial decisions of state courts or of state practice may suggest the general recognition of a principle of (customary) law.

3/20 A general, although not inflexible, working guide is that before a usage may be considered as amounting to a customary rule of public international law, two tests must be satisfied: These tests relate to the material and the psychological aspects involved in the formation of the customary rule. As regards the material aspect, there must be a long-standing consistent recurrence or repetition of the acts to give birth to a customary rule. The psychological aspect is better known as the »opinio juris« or the mutual conviction that the recurrence is the result of a compulsory rule.

3/21 The importance of customary public international law is, generally, diminishing, whereas the number and importance of international treaties is continuously rising. Rules of customary law deal, among other things, with the duties of neutrality as between states, the status and powers of international organisations, and questions of sovereign immunity.

Recall what was said in no. 1/9 et seq., above about the difficulty of enforcement of public international law. One of the main characteristics

of public international law is the identity of legislators and those subjected to legislation. The duties of the states can normally not be enforced because there are no superior institutions to enforce them, and state courts cannot adjudicate over other states based on the latter's state immunity.

B. International treaties

3/22 International treaties are the most important and most frequently used source of public international law. Classical treaties of public international law only established rights and duties among states. It is not important to know how these state duties were incorporated into domestic legal systems as state courts or agencies were not able to enforce these duties in any case due to state immunity. However, a vast number of treaties not only create rights and duties among states but also oblige states to create directly enforceable rights and duties of private persons in their own legal systems. The aim of these treaties is to create uniform (public or private) law within the domestic systems of the contracting states.

If, for instance, Austria signs a treaty on uniform technical standards of motor vehicles, it is obliged to incorporate these standards into its domestic legal system and ensure compliance with them. Another example is the Vienna Sales Convention (CISG): By signing this Convention Austria was obliged to establish rights and duties of the parties of international sales contracts, as prescribed in the CISG, which can be directly enforced by the contract parties in Austrian courts. The question thus arises: how can Austria comply with these duties of transformation, incorporation or adoption of the uniform law rules of international treaties?

Note, however, that not all public international law treaties – even those dealing with rights of individuals – intend to create directly enforceable rights for those individuals or create rights of individuals at all. Such treaties – even once they have been incorporated into the Austrian legal system – are not directly enforceable by Austrian courts or administrative authorities. The effect of direct applicability thus only arises if the treaty itself intends to create this direct applicability.

3/23 According to the rules of the Austrian Constitution (B-VG), the Austrian federal state has the general power to conclude international treaties with all countries worldwide and with international organisations. The Austrian federal President is competent to conclude international treaties on behalf of the Austrian federal state. If, however, the treaty changes or supplements Austrian statutory law, the President needs the consent of the Austrian parliament(s) (»Nationalrat« with respect to federal statutory law or »Landtage« with respect to »Landesrecht«). If the treaty changes or supplements »ordinary« statutory law, a majority decision of the parliament is required, whereas if it changes or supplements constitutional law, a two-third majority is necessary. Consequently, treaties that do not change or supplement Austrian statutory law do not need the consent of the Austrian parliament(s). In such cases, the President can delegate his or her competence to conclude the treaty to the federal government or even to a specific federal minister.

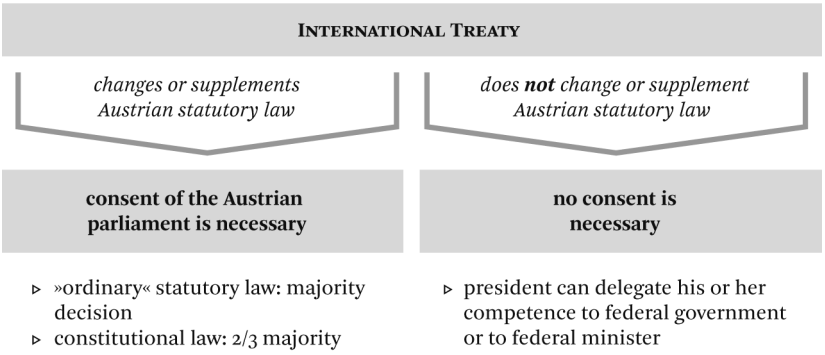

Figure 16: International treaties.

3/24 Generally, an international treaty that has been concluded by the competent state organs (usually President and Parliament) is immediately applicable in the Austrian legal system. Depending on whether or not it amended existing domestic or constitutional statutes the treaty is treated like a regulation, an ordinary statute or a constitutional statute. Treaties that amend or supplement an administrative regulation, an ordinary statute or a constitutional statute have to be published in the »Bundesgesetzblatt« or »Landesgesetzblatt«.

3/25 There is, however, an exception to that general rule of immediate applicability which is stipulated in art. 50 para. 2 B-VG. In the course

of the conclusion of an international treaty, the competent institutions can decide that the treaty shall not be directly applicable in Austria until it is specifically incorporated by an appropriate act. In the case of a treaty changing or supplementing statutory law, the Parliament can give its consent to the conclusion of the treaty, but determine that the treaty shall not be applicable until it has been adopted by a specific transformation statute. In such a case, Austrian courts and administrative authorities can apply the provisions of the treaty only after the relevant transformation statute has been passed and has entered into force. If no parliamentary consent to a specific treaty is necessary, the President or Minister him or herself can decide on a »Erfüllungsvorbehalt«.

How is customary public international law created? How does customary public international law become applicable in the Austrian legal system?

Are all international treaties part of public international law? Which are the other fields of law that the rules of a treaty can be considered part of?

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Explain the two different models for the conclusion and transformation of a treaty in the Austrian B-VG.

Why is it important to determine whether the domestic legal system follows the theory of (a) transformation, (b) incorporation or (c) order of application? Consider the three models of how (a) customary public international law, (b) treaties without »Erfüllungsvorbehalt« and (c) treaties with »Erfüllungsvorbehalt« become applicable in the Austrian legal system and try to link them to the different approaches (a) (b) and (c) mentioned at the beginning of the chapter.

III. The United Nations and its organs

A. Introduction

3/26 The United Nations, which formally came into existence in 1945, is the principal international organisation designed to prevent military confrontations among its members and to help resolve international disputes. It has also embarked on numerous other tasks, from simplifying

international air travel to the eradication of malaria and smallpox. The preamble to the UN Charter expresses the ideals and common aims of all those whose governments together create the United Nations.

3/27 Membership of the United Nations is open to all peace-loving nations which accept the obligations of the United Nations Charter and, in the eyes of the organisation, are able and willing to carry out these obligations. Today, almost all states of the world are members of the UN. New Member States are admitted by the General Assembly on the recommendation of the Security Council. The Charter provides for the suspension or expulsion of a member for violation of the principles of the Charter, but no such action has ever been taken since the establishment of the Organisation.

B. Organs of the United Nations

3/28 The General Assembly is the main deliberative organ of the UN. It is composed of representatives of all Member States with each Member State having one vote. Decisions on important questions, such as recommendations on peace and security, the admission of new members and budgetary matters, require a two-thirds majority. Decisions on other questions are reached by a simple majority.

3/29 According to the Charter, the functions and powers of the General Assembly include the following:

- to consider and make recommendations on the principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments;
- to discuss any question relating to international peace and security and, except where a dispute or situation is currently being discussed by the Security Council, to make recommendations on it;
- to discuss and, with the same exception, make recommendations on any question within the scope of the Charter or affecting the powers and functions of any organ of the United Nations;
- to consider and approve the United Nations budget and to apportion the contributions among Members;
- to elect the non-permanent members of the Security Council, the members of the Economic and Social Council and those members of the Trusteeship Council that are elected;

- to elect jointly with the Security Council the Judges of the International Court of Justice; and
- on the recommendation of the Security Council, to appoint the Secretary-General.

3/30 In accordance with the »Uniting for Peace« resolution adopted by the General Assembly in 1950, the Assembly may take action if the Security Council, as a result of a lack of unanimity of its permanent members, fails to act in the face of an apparent threat to peace, breach of the peace or act of aggression. The Assembly is empowered to consider the matter immediately with a view to making recommendations to members for collective measures, including, in the case of a breach of the peace or act of aggression, the use of armed force when necessary to maintain or restore international peace and security.

3/31 There is one regular session of the General Assembly annually (from mid-September till mid-December). The work of the United Nations year-round derives largely from the decisions of the General Assembly – that is to say, the will of the majority of the members as expressed in resolutions adopted by the Assembly. That work is carried out by committees and other bodies established by the Assembly, international conferences called for by the Assembly and by the Secretariat of the United Nations (the Secretary-General and his or her staff of international civil servants).

3/32 On 15 March 2006, the General Assembly adopted the resolution A/RES/60/251 to establish the Human Rights Council as a subsidiary organ of the General Assembly. The United States, the Marshall Islands, Palau, and Israel voted against the Council's creation, claiming that it would have too little power and that there were insufficient safeguards to prevent human rights-abusing nations from taking control. The Human Rights Council is based in Geneva and replaces the Commission on Human Rights.

3/33 The Security Council has primary responsibility, under the Charter, for the maintenance of international peace and security. It consists of 15 Member States: five permanent members – China, France, Russia, the United Kingdom, and the United States – and 10 members elected by the General Assembly for two-year terms. Each member of the Council has one vote. Decisions on substantive matters require nine votes including the concurring votes of all five permanent members. This is the rule of »great power unanimity«, often referred to as

the »veto« power. All five permanent members have exercised the right of veto at one time or another. However, if a permanent member does not support a decision but does not wish to block it through a veto, it may abstain.

3/34 Under the Charter, all members of the United Nations agree to accept and carry out the decisions of the Security Council. While other organs of the United Nations make recommendations to national governments, the Council alone has the power to take decisions which Member States are obliged to comply with in terms of the Charter.

3/35 Under the Charter, the functions and powers of the Security Council are:

- to maintain peace and security in accordance with the principles and purposes of the United Nations;
- to investigate any dispute or situation which might lead to international friction and to recommend methods of adjusting such disputes or the terms of settlement;
- to determine the existence of a threat to the peace or act of aggression and to recommend what action should be taken;
- to call on members to apply economic sanctions and other measures not involving the use of force in order to prevent or stop aggression;
- to take military action against the aggressor;
- to recommend the admission of new members and the terms on which states may become parties of the Statute of the International Court of Justice;
- to recommend to the General Assembly the appointment of the Secretary-General; and
- together with the Assembly, to elect the Judges of the International Court.

3/36 The Economic and Social Council (ECOSOC) was established by the Charter as the principal organ to coordinate the economic and social work of the United Nations and the specialised agencies and institutions – known as the »United Nations family« of organisations. The ECOSOC has 54 members who serve for three years. Each year 18 members are elected for a three-year term to replace 18 members whose three-year term has expired.

3/37 Under the Charter, the ECOSOC may consult with non-governmental organisations (NGOs) which are concerned with matters within the

Council's competence. The Council recognises that such NGOs should have the opportunity to express their views and that they are frequently in possession of special experience or technical knowledge of value to the Council and its work. Today, over 3,000 NGOs have consultative status with the Council. NGOs which have been given consultative status may send observers to public meetings of the Council and its subsidiary bodies and may submit statements relevant to the Council's work.

3/38 The Charter sets up an International Trusteeship System to promote the advancement of the inhabitants of trust territories and their progressive development towards self-government and independence. In November 1994, the Trusteeship Council temporarily suspended operation due to the independence of the last UN trust territory. Although the Trusteeship Council remains one of the principal organs of the UN, it will no longer meet on an annual basis but, rather, only if a situation requires its attention.

3/39 The International Court of Justice or ICJ in The Hague (Netherlands) is designated to be the principal judicial organ of the United Nations (see artt. 92–96 UN Charter). The activities of the ICJ are also based on the separate Statute of the International Court of Justice. The ICJ is composed of 15 judges, who are elected for terms of office of nine years. Every three years, one third of the Court is elected, or re-elected. The UN General Assembly and Security Council are responsible for electing the judges from a list of candidates provided to the Secretary-General by national groups appointed by the individual governments. No two judges may be nationals of the same state. The parties to a dispute in front of the ICJ have, generally, no influence on the composition of the Court. However, if none of the judges is a national of the state which is a party to the dispute, this state has the right to elect a judge who becomes an ad hoc member of the Court only with respect to that dispute. The Court decides with majority decision.

3/40 Only states can be parties in cases before the ICJ. A case involving private persons can never be brought before the ICJ. The court has jurisdiction over two types of cases – contentious cases and cases seeking an advisory opinion. The jurisdiction in contentious cases is based on the consent of the parties, either express or implied. Non-Member States of the UN can also become parties by voluntarily subjecting themselves to the jurisdiction of the court. Consent may be given on an ad hoc basis or by prior agreement, for example by provision in an international agreement granting the court jurisdiction over a dispute

between parties to that agreement concerning its interpretation or application. Contentious cases may also be brought under the compulsory jurisdiction of the court between states that have made a general declaration to recognise the jurisdiction of the court as compulsory in relation to any other state accepting the same obligation. Austria has made such a general declaration.

Usually, the court is called upon to decide »legal disputes«, for instance, disputes regarding the interpretation and application of international treaties. But the Court may also accept a case submitted to it by the parties even though it involves a political rather than a legal dispute. In such a case the Court is in effect asked to decide the case »ex aequo et bono«, and not according to international legal principles which do not exist in such cases as the question is a political and not a legal one. **3/41**

While the advisory opinions of the ICJ are not binding, the judgments that the ICJ renders in contentious cases are binding upon the parties. If a party fails to comply with the judgment of the court, any other party may call on the Security Council to enforce the judgment. The council may, if it deems necessary, make recommendations or decide upon measures – such as economic measures provided for in art. 41 of the Charter – to give effect to the judgment. Members of the UN have agreed to accept and carry out any such decision of the Security Council. **3/42**

The ICJ should not be confused with, for instance, the Special Court for Sierra Leone (SCSL) – in part also situated at The Hague, which is not a permanent court but rather an ad hoc court that was set up by the government of Sierra Leone and the United Nations to adjudicate international criminal cases that have occurred in the territory of Sierra Leone since 30 November 1996. For instance, on 26 April 2012 this court ruled unanimously that the former Liberian president Charles Taylor was guilty of several counts of war crimes and crimes against humanity. In the preceding trial former model Naomi Campbell gave evidence that she was handed so-called »blood diamonds« by men working for Charles Taylor.

The International Criminal Tribunal (ICT) decides on accusations against individuals who have allegedly committed one of the criminal offences defined in the Statute of the International Criminal Tribunal. These criminal offences were partly derived from international conventions on international criminal law, from customary public inter-

national law, for example, in the case of genocide, or crimes against humanity or newly defined, such as several types of severe war crimes.

Neither the ICT nor the SCSL should be confused with the permanent International Criminal Court (ICC) which was also established in The Hague. It is based on a Convention (the »Statute of Rome«) and has no connection with the UN. The Statute of the Court – which was approved by a vote among the 120 states participating in the Rome meeting – entered into force after ratification by 60 states. As of today, over 100 states have joined the Convention. The USA, China and Israel voted against the Convention and the Statute of the Court and declared that they would not ratify it. The abstention of the USA is generally considered a serious concern for the development of the jurisdiction of the Court.

The criminal offences that can be brought before the ICC are defined in the Statute of the Court. They include genocide, war crimes and crimes against humanity, such as widespread or systematic extermination of civilians, enslavement, torture, rape, forced pregnancy, persecution on political, racial, ethnic, or religious grounds, and enforced disappearances. An alleged criminal can be accused and brought before the ICC if he or she is either a national of a ratifying state or the crime was allegedly committed in the territory of a ratifying state. Additionally, the UN Security Council can refer the situation to the Prosecutor, irrespective of the location of the crime or the nationality of the accused. However, the jurisdiction of the ICC covers only events which took place after 1 July 2002.

It is noteworthy that the ICC may deal with cases that occurred exclusively on the territory of one state and that involved only private individuals. The crimes that fall under the jurisdiction of the ICT and the ICC are of such severity that they are regarded as concerning not only the state of occurrence but the whole community of nations. Thus, the enforcing institutions are of international as opposed to national character. The ICC operates according to the principle of »complementarity«, that is, only when national courts are unable or unwilling to prosecute the respective crimes. The SCSL, however, can claim primacy and is thus permitted to take over national proceedings at any time if it is considered that this would be in the interests of international justice. The criminal law defining the relevant crimes is considered to be a part of public international law.

3/43 The Secretariat assists the other organs of the UN and administers the programs and policies laid down by them. The head of the Secretariat is the Secretary-General, who is appointed by the General Assembly on the recommendation of the Security Council. As one of his many

functions, the Secretary-General may bring to the attention of the Security Council any matter which, in his or her opinion, threatens international peace and security, and may use his or her good offices to help resolve international disputes. The over 25.000 civil servants of the Secretariat in the UN Headquarters in New York and in offices and centres all around the world take an oath not to seek or receive instructions from any government or outside authority. Under art. 100 of the UN Charter, each Member State undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their duties.

What are the functions and powers of the General Assembly of the UN?

What is the content of the »Uniting for Peace« Resolution of the General Assembly?

Which states are members of the Security Council and how do they vote?

What is the Economic and Social Council and what does it do? ?

Which are the competences of the ICJ? Which states are bound by its decisions?

Which are the differences between the SCSL and the ICC?

What are the functions and powers of the UN Secretary-General?

IV. The protection of peace and security

3/44

It is generally accepted that the main spheres of contemporary public international law are the protection of peace and the international economic order, the protection of human rights, and the creation and support of sustainable development. The following two chapters are dedicated to two of these main areas, namely the protection of peace and security and the protection of human rights, which are also key purposes of the UN as enumerated in art. 1 UN Charter.

A. The prohibition of the use of force

3/45 The general prohibition of the use of force is laid down in art. 2 para. 4 UN Charter.

»All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.«

3/46 According to the general scholarly view, the prohibition of the use of force under art. 2 para. 4 UN Charter can only be violated by a legal subject of public international law. The classical subjects of public international law are states and international organisations, not private groups, individuals or companies. The latter are regarded as subjects of public international law only in particular fields of this area of law, particularly in the area of human rights, and in this context are endowed with certain rights against states or international organisations rather than being burdened with duties of public international law.

On 3 October 2012 a shell fired from Syria into the Turkish town of Akçakale killed five Turkish citizens and wounded several others. The Turkish military retaliated within the next 2 hours by firing artillery salvos against Syrian targets over 3 days.

However, subsequent reports made clear that the shells fired into Turkey were of NATO origin and assumedly not launched by the Syrian military but rebel groups. As these groups cannot be associated with the Syrian state the question arises whether the attack falls within the scope of art. 2 para. 4 UN Charter.

The terrorist attacks of 11 September 2001 on the World Trade Center in New York and several other targets were carried out by private groups rather than by a particular state. Again it is unclear whether such attacks also fall within the scope of art. 2 para. 4 UN Charter.

3/47 The general prohibition of the use of force also includes measures of force against a state that do not amount to war-like operations. Article 2 para. 4 UN Charter therefore applies to all kinds of measures di-

rected against a state that are carried out by arms, including the delivery of arms or the logistical support of the delivery of arms which may amount to such a measure of force. It is disputed whether economic or political pressure in this regard is also included in the ambit of art. 2 para. 4 UN Charter.

The prohibition of the use of force is generally not applicable to the use of force by a state against members of its own population within the boundaries of that state. An exception is where such internal use of force amounts to a threat to or breach of international peace and security in the sense of art. 1 para. 1 UN Charter. In this case the prohibition of the use of force under art. 2 para. 4 UN Charter may be violated. **3/48**

B. The right of self-defence

There are two important exceptions to art. 2 para. 4 UN Charter, namely the right of self-defence according to art. 51 UN Charter and the system of collective security under artt. 39–50 UN Charter. **3/49**

> The right of self-defence is laid down in art. 51 UN Charter: »Nothing in this Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.«

The right of self-defence exists only under the following circumstances: **3/50**

- There must be an armed attack against a Member State of the UN;
- The act of self-defence must follow the armed attack directly and must be proportionate to the attack; and
- The measure of self-defence taken by a state must be immediately reported to the UN Security Council. The defending state must give the Security Council the possibility to deal with the incident and in the system of collective security (artt. 39–50 UN Charter).

On the face of the retaliation attacks within 2 hours, the line taken by the Turkish government in the Akçakale incident was arguably that its actions were an »immediate reaction« to the Syrian attacks in the sense of art. 51 UN Charter.

After the terrorist attacks of 11 September 2001, which were attributed to Al Qaida, Osama bin Laden and the Taliban-government of Afghanistan, the USA reacted via an air attack against Afghanistan on 7 October 2001. The USA justified its reaction as an »immediate reaction« to the terrorist attacks in the sense of art. 51 UN Charter. Many scholars, however, doubt that the requirement of a direct and immediate reaction was met. It is argued that the USA first amassed allies to support its military operation against Afghanistan and made other necessary preparations which resulted in delay in its reaction.

3/51 Any measure of force that does not amount to an »armed attack« in the sense of art. 51 UN Charter does not give the attacked state the right to defend itself. Therefore, the terms »force« used in art. 2 para. 4 UN Charter and »armed attack« in art. 51 UN Charter are not synonymous.

3/52 The requirement of a direct and immediate reaction to the armed attack is generally defined with reference to a 1837 British/US-American case (Caroline case) where it was stated that the necessity for self-defence must be »instant, overwhelming, leaving no choice of means, and no moment for deliberation«.

3/53 The requirement of proportionality limits the kind and intensity of the defence measure. The measure must be determined by the need to defend one's self and should not exceed the means and intensity necessary for defence. The traditional approach forbids measures that exceed the needs of self-defence as these aim to punish the attacking state.

In that sense it is certainly questionable whether the US military operations against Afghanistan – leading to the removal of the Taliban-regime – were proportionate in the sense of art. 51 UN Charter. Certainly, in the original sense of the proportionality requirement, they were not. The removal of a generally dangerous regime ready to use force inside and outside its territory may, however, be interpreted as a measure of »preventive self-defence« (see no. 3/56, below). It is argued that its removal was necessary to maintain international peace and security, which is one of the main purposes of the UN (see no. 3/44, above).

Since 2004 the US military makes use of unmanned robots, so-called »drones« to strike at suspected Taliban fighters not only in Afghani-

stan but also in Pakistan and elsewhere. The US administration upheld that the US has been subjected to an armed attack by another nation, namely Afghanistan and thus responds militarily in self-defence.

The proponents of these drones say that it offers a precision way of hitting targets without the potentially disastrous deployment of US manpower abroad. However, critics point out that drone strikes frequently cause civilian casualties; the London-based Bureau of Investigative Journalism tracks drone casualties, and estimates that in Pakistan alone 366 strikes have killed up to 3.581 people, with 884 being innocent civilians.

Again, with regard to these numbers, it is questionable whether these drone strikes are proportional – especially as they are not limited to the state against which the US arguably defends itself.

3/54 The duty to report every measure of self-defence to the Security Council expresses the priority of measures of collective security (artt. 39–50 UN Charter) over the right of self-defence of single states. Unilateral self-defence shall only be applied if measures of collective security are not taken or would come too late. This view is, however, disputed because the right of self-defence is based on customary public international law (»inherent right«) and accordingly exists independently of the UN Charter as a customary right. It is argued that this customary right of self-defence may therefore not depend on a confirmation by the Security Council. According to this view, the right of self-defence may be exercised independently of the UN system of collective security.

3/55 In the case of an armed attack, the attacked state may defend itself or may be assisted by other states in defending itself. Art. 51 UN Charter expressly allows such measures of collective self-defence (»right of individual or collective self-defence«). It is on the basis of this article that many international treaties which oblige their contracting states to assist each other in cases of armed attacks by other states have been concluded. The most important of these military assistance treaties is the NATO-Treaty.

In the example of the Akçakale incident, the Turkish government referred to its right to self-defence under art. 51 of the UN Charter. Following Ankara's invocation of the respective artt. in the NATO treaties,

NATO's North Atlantic Council stated that the alliance: »... demands the immediate cessation of such aggressive acts against an ally, and urges the Syrian regime to put an end to flagrant violations of international law ...«. On 9 October 2012, NATO Secretary-General Anders Fogh Rasmussen reported that NATO has completed making plans to defend Turkey from Syrian attacks.

3/56 It is highly disputed whether the UN Charter and customary public international law permit measures of »preventive self-defence«. Preventive self-defence takes place when a state (or a number of states) applies (apply) measures of force against another state which has yet to carry out an armed attack against the first state(s) but which is assumed to be a threat (imminent danger of attack) to such states. The wording of art. 51 UN Charter, namely, »if an armed attack occurs« seems to exclude preventive self-defence. State practice with respect to such a right of preventive self-defence is not uniform, but, following the Iraq war in 2003, the majority opinion seems to deny the existence of such a right. The right of preventive self-defence would endanger the aim of the UN Charter's system of collective security to reduce the unilateral application of force by single states to a minimum as it would leave it up to each individual state to evaluate whether a threat of an armed attack exists which would justify a defence measure. If such self-evaluations and the resulting applications of force were allowed, a single state could confront the Security Council with a fait accompli leaving to it no further possibility to decide.

The US military drone strikes on Islamic militants' hideouts in Pakistan since 2004 arguably exceeding the self-defence permitted under the proportionality requirement of art. 51 are currently justified by the US administration as acts of preventive self-defence, that is, the prevention of future terrorist attacks which might occur in the USA and other states in the world as well as the US assumption that the US can act in preventive self-defence to protect US and the coalition soldiers in Afghanistan, if neighbouring countries such as Pakistan are unwilling or unable to crack down on militants.

3/57 As explained above, the self-defence of a single state and its allies against terrorist attacks faces a number of legal problems:

- It must be possible to attribute the terrorist attacks, which are normally carried out by private groups, to a particular state. If this terrorist group (like Islamic militants) has its central organisation in a certain state (formerly Afghanistan, today more likely also elsewhere), but is not actively supported by this state, there is no »armed attack« by this state. If the terrorist attack cannot be attributed to a certain state, the defending states are not permitted to direct their defence measures against this state under art. 51 UN Charter.
- One must determine whether the terrorist attack was an »armed attack« in the sense of art. 51 UN Charter. If we take the example of the Pakistan drone strikes, it is questionable whether the operations of Islamic militants in Pakistan amounts to an armed attack under art. 2 para. 4 UN Charter against the USA.
- One must also determine which self-defence reaction is justifiable. Traditionally, the self-defence measure must constitute an immediate and proportionate reaction. The drone strikes resulting in civil casualties are likely not a proportionate measure.
- Measures of preventive self-defence, where a single state or a number of states determine for themselves what constitutes a threat to »international peace and security« in the sense of art. 1 para. 1 UN Charter and decide to prevent such a threat by the use of military force, are not covered by the UN Charter (art. 51) or by customary public international law.

C. The system of collective security

3/58 The system of collective security (art. 39–50 UN Charter) is based on the absolute prohibition of force in art. 2 para. 4 UN Charter. The system directs the collective powers of the Members of the system against a potential or actual aggressor from outside or from within the system. In this respect the Security Council has two basic competences. It determines whether a certain use of force by a state is a violation of the general prohibition of force and it decides which sanctions will be taken by the system against the aggressor.

These two competences of the Security Council are laid down in art. 39 UN Charter.

»The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Artt. 41 and 42, to maintain or restore international peace and security.«

3/59 The »act of aggression« is defined by Resolution 3314 (XXIX) of the General Assembly of the UN. However, in practice the »threat to the peace« and the »breach of the peace« in the sense of art. 1 para. 1 UN Charter plays the most important role. These notions comprise »armed attacks« in the sense of art. 51 UN Charter as well as violations of the prohibition of force in art. 2 para. 4 UN Charter. In addition they also comprise situations of »threat to the peace« which precede a potential breach of the peace. A threat to the peace may also comprise internal measures of a state against its own population or arise in civil wars resulting in, for instance, extreme suffering by the population or violations of human rights. In these cases, particularly where there is a mass movement of refugees to neighboring countries, there is the possibility of destabilisation of the entire region, which could in turn become a serious concern for international peace and security. According to the resolutions of the Security Council, international peace and security may also be threatened by internal conflicts that do not cause serious negative effects on other states if they include serious violations of public international law, such as ethnic cleansing or other severe violations of human rights and crimes against humanity.

3/60 This broad interpretation of art. 39 UN Charter (»threat to the peace«) by the Security Council confirms the widely held conviction in modern public international law that severe domestic violations of basic duties of public international law, such as crimes against humanity and extreme violations of human rights, are no longer viewed as the private affair of the particular state in question in the sense of the »domaine réservé« described in art. 2 para. 7 UN Charter. Rather, such violations constitute a concern for the world community and impose a duty on the UN (Security Council) to react. Thus art. 39 UN Charter empowers the Security Council to adopt measures in pure domestic situations of conflict in cases of, for example, race discrimination, ethnic cleansing and other severe violations of human rights: these measures are called »humanitarian interventions«.

3/61 Where Chapter VII of the UN Charter is applicable according to its art. 39, the Security Council may order two types of sanctions to be executed:

- »measures not involving the use of armed force« (art. 41 UN Charter) and
- »action by air, sea, or land forces« (art. 42 UN Charter).

3/62 Peaceful measures, according to art. 41 UN Charter, may be partial or complete economic boycotts, the interruption of traffic by rail, sea and air, the interruption of communication facilities like postal services, telegraphs, radio, etc. or the severance of diplomatic relations. If the Security Council is of the opinion that peaceful measures would be inadequate or if such measures prove to be ineffective, it can resort to measures involving the use of military force according to art. 42 UN Charter. The UN does not have its own military forces. On the basis of artt. 42 and 48 UN Charter, the Security Council thus regularly authorises one or a number of Member States to carry out the military sanctions required by the respective Security Council Resolution. The Security Council also frequently uses its power to order measures to be executed in so-called »post-conflict situations«. Examples are the foundation of the Special Court for Sierra Leone (SCSL) (see no. 3/42, above), arms control by the Security Council in the wake of a war and the indemnification for consequences of a war.

3/63 When the Security Council acts, under chapter VII of the UN Charter, to restore international peace and security in the case of a breach of peace, threat to peace, or act of aggression, it can depart from the rules of public international law such as the prohibition of the use of force or the prohibition to interfere with the home affairs of a state as far as this is necessary to achieve the higher goal of international peace and security. The Security Council has to date not sanctioned the use of armed force against an aggressor directly, but has approved various humanitarian interventions or collective measures of Member States in or against a state contrary to the general prohibition of interference in domestic affairs. It has, however, never approved such measures directed against one of the permanent Members of the Council.

3/64 As you can see, the deficiencies of the system of collective security primarily arise from the veto-power of the five permanent members of the Security Council (USA, Great Britain, France, Russia and China). It is impossible for the Security Council to take measures or sanctions against violations in the sense of art. 39 UN Charter which were committed by one of its permanent members or a country one of the permanent members has an interest in protecting. Thus, in many cases,

sanctions under Chapter VII UN Charter which would be necessary and just according to the rules of public international law, cannot be ordered by the Security Council. The system of collective security can at any time be completely blocked by one of the permanent Member States of the Council, even if the overwhelming majority of all other Member States supports the action proposed by the Security Council. The actions of the Security Council raise two sets of concerns. First, can the Security Council endorse any measure taken by one or more Member State(s) against an aggressor even if this measure manifestly violates rules of public international law? Is there any legal limit to its activities? How far can the Security Council go in endorsing or tolerating the abuse of the right of self-defence by single states? Second, the dominance of the five permanent members of the Security Council results in unequal treatment of nations by the acts of the Security Council, on the one hand, and a paralysation of the Council as an organ of a community-oriented system of collective security, on the other hand. This is illustrated by the inability to include Germany, Japan and Brazil as permanent members due to the veto of certain permanent members.

D. »Interventions« without authorisation by the Security Council

3/65 As described above, the relationship between ordinary self-defence in the sense of art. 51 UN Charter and the system of collective security is not entirely clear. Some argue that the »inherent« customary right of self-defence is more or less independent of the system of collective security in Chapter VII UN Charter, while others give priority to the Security Council in exercising its powers according to Chapter VII. It is clear, however, that where the Security Council is notified of a measure of self-defence and it does not react to the armed attack against a state by ordering the appropriate measures according to Chapter VII UN Charter, the defending state can defend itself, either alone or together with its allies (collective self-defence).

3/66 But what if the Security Council remains inactive in a case where there is a »threat to the peace« (art. 39 UN Charter) which does not involve an »armed attack« against another state in the sense of art. 51 UN Charter?

In the example of the drone strikes, the US administration assumes that Pakistan is unwilling or unable to crack down on Islamic militants. Do single states have the right to intervene without the Security Council's authorisation? In the case of Pakistan no such authorisation by the Security Council for military action exists.

Syria's widening civil war and the growing toll on civilians have raised a debate about the international community's responsibility to mount a humanitarian intervention by outside forces. However, Russian (along with Chinese) officials have vowed to block further efforts at Security Council-endorsed interventions even amid humanitarian suffering. Again, could single states or a group of states intervene on humanitarian grounds?

Neither art. 51 UN Charter nor the collective security provisions of Chapter VII UN Charter provide such a right of single- or collective-state-intervention in internal conflicts, usually, however, only for humanitarian purposes. It is argued that severe internal violations of basic rules of public international law constitute a threat to international peace and security in the sense of art. 1 para. 1 UN Charter and it is one of the UN's main goals to maintain international peace and security. Accordingly, such violations may well constitute a violation of the general prohibition of force in art. 2 para. 4 UN Charter. If, however, the Security Council is blocked by one of its permanent members and thus cannot carry out the goal of art. 1 para. 1 UN Charter, it is argued that the Member States should have the right to step in and carry out its job. If such unauthorised interventions by the USA occur frequently and are accepted by the community of the UN Member States, a customary right to carry out such interventions might develop. **3/67**

The disadvantage of such a new customary right is the danger of abuse by states as states normally act more in their own interest than in the interest of the community of all states. They might, for example, determine a need to intervene when it is convenient to intervene and destabilise a regime for ulterior political purposes. If an unauthorised humanitarian intervention does not constitute such an abuse, it can be said that such an intervention is »technically illegal« because no right to intervene exists neither on the basis of the UN Charter, nor on the basis of customary public international law, but seems to be »morally legitimate«. **3/68**

Questions ▹

To whom is the general prohibition of threat and use of force in art. 2 para. 4 UN Charter addressed?

What are the two important exceptions to art. 2 para. 4 UN Charter?

What are the requirements for legal measures of self-defence under art. 51 UN Charter?

What is collective self-defence and is it permissible?

? What is preventive self-defence and is it permissible?

What are the requirements for the application of Chapter VII UN Charter (collective security)? Who determines whether these requirements are met?

What measures can the Security Council adopt under Chapter VII UN Charter?

Why is the system of collective security under Chapter VII UN Charter considered »ineffective«?

May interventions be carried out by states without authorisation by the Security Council?

V. The protection of human rights

A. The historical development of human rights in public international law

3/69 Although the idea that human beings are inherently entitled to certain fundamental rights and freedoms has its roots in early human thinking, the concept that human rights are an appropriate subject of public international law is relatively new. Throughout most of human history, the way one government treated its own citizens was considered solely its own business and not a proper concern of any other nation (see no. 3/1 et seq., above). States, therefore, had certain public international law duties regarding the treatment of foreign citizens on their territory, but no public international law duties with respect to their own citizens.

3/70 Most of what we now regard as »international human rights law« has emerged only since 1945, when, in the wake of the holocaust and

other Nazi denials of human rights, the nations of the world decided that the promotion of human rights and fundamental freedoms should be one of the principal purposes of the new United Nations Organisation. To implement this purpose, the UN Charter established general obligations requiring UN Member States to respect human rights and provided for the creation of a Human Rights Commission to protect and advance those rights. UN concern with and involvement in human rights has expanded dramatically since its origins in 1945.

Numerous international instruments have been adopted, including the Universal Declaration of Human Rights (UDHR) and the Genocide Convention in 1948; the Convention on the Political Rights of Women in 1952; the Standard Minimum Rules for the Treatment of Prisoners in 1957; the Convention on the Elimination of All Forms of Racial Discrimination in 1965; and the International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights in 1966.

Increased UN involvement in human rights matters during this period was mirrored by growing regional interest in human rights questions, as illustrated by the entry into force in 1953 and subsequent evolution of the European Convention on Human Rights (ECHR), the formation of the Inter-American Commission on Human Rights in 1960, and the entry into force of the American Convention on Human Rights in 1978. **3/71**

The rapid growth of UN membership in the early 1960s due to the accession of a significant number of African and other developing nations, who brought with them problematic issues concerning self-determination and racial discrimination, particularly in southern Africa, and the growing emphasis by Arab countries on human rights aspects of the Palestine question, resulted in these human rights issues assuming a leading role in UN politics. US congressional action, based on international human rights principles, and the US Presidents' position post Jimmy Carter that international human rights should play a leading role in US foreign policy raised interest in human rights, not only in the USA, but also in the rest of the world. The international human rights movement received further attention when the Nobel Prize for Peace in 1977 was awarded to Amnesty International for its human rights work for »prisoners of conscience«. Since then, many individual human rights activists have received the Nobel Prize for Peace over the years. **3/72**

B. The sources of human rights

3/73 Public international human rights law is derived from a variety of sources and involves many kinds of materials, both international and national. The following examples illustrate the many different types of materials.

1. Multilateral treaties

3/74 There are now over twenty important multilateral treaties in force in the field of human rights law which create legally binding obligations for those nations that are parties to the treaties. The system of enforcement of the established human rights is, however, different from treaty to treaty. Some treaties, like the ECHR, establish institutions of their own (European Court of Human Rights) which guarantee relatively effective enforcement through individual claims. Other possible means of enforcement include complaints filed with the appropriate political or juridical institutions by states against other states that have allegedly violated the human rights provisions of the respective convention; some complaint systems also permit human rights organisations to act as complainants.

As mentioned above, the ECHR, which establishes human rights that can be directly enforced by individuals against Member States in national courts as well as before the European Court of Human Rights (ECtHR) in Strasbourg, is an important example of an international human rights treaty. The person alleging a violation of his or her human rights under the ECHR must first bring the claim to the court of last resort in the national court system before he or she can appeal to the ECtHR. Other examples of key human rights treaties include the UN Charter, which is binding on almost every country in the world, and the various UN sponsored human rights conventions (see no. 3/70, above).

2. International declarations, resolutions and recommendations

3/75 Other »sources« are the international declarations, resolutions, and recommendations regarding international human rights that have

been adopted by the UN or other international organisations or conventions. While these international instruments are not directly binding in the legal sense, they establish broadly recognised standards that are frequently invoked in connection with human rights issues. Under certain circumstances these standards could develop into customary public international law and, thereby, assume a legally binding character. Instruments which do not develop into customary law are not legally binding but they nevertheless exercise a certain practical or moral authority in international and state politics: they are not formal »sources of law« but rather so-called »soft law«. »Soft law rules« are rules which, while not legally binding sources of law, nevertheless exercise significant influence in legal practice in the specific field of public international law.

The most important of these »soft law« instruments is the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948, which has provided a framework for much of the UN's subsequent work in this sphere. Other examples are the 1975 Final Act of the Conference on Security and Cooperation in Europe (Helsinki Accord); the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; the UN Declaration on the Rights of the Child; and the Standard Minimum Rules for the Treatment of Prisoners.

3. National statutes and constitutions

3/76

Another layer of human rights sources are national statutes and constitutions. Some of the fundamental rights in national law sources are not understood as »human rights« in the universal sense that they are granted to all human beings living in that state, but rather as fundamental or constitutional rights of the citizens of the state. Fundamental rights which pertain only to citizens do not bind the state with respect to its treatment of foreign nationals. Thus, while the human rights protected by international treaties, like the ECHR, generally guarantee rights to all persons, the fundamental rights and freedoms granted by national sources do not always do so.

4. Jurisdiction ▹

4. Jurisdiction

3/77 Finally, you also have to take into account the jurisdiction of national and international institutions relevant to the protection of human rights, in particular, the jurisdiction of the ECtHR where the court construes the human rights provisions of the ECHR.

C. The enforcement of human rights

3/78 The effective enforcement of human rights is the key to ensuring that the system of public international human rights law is effective but has to date proven difficult. Not all human rights can as easily be enforced as those in the ECHR before the ECtHR. A key effect of human rights treaties is the considerable reduction of the sovereign powers of the Member States. This is a delicate subject in public international law and, thus, even a human rights court with relatively extensive competence to adjudicate in this field, such as the ECtHR, is at times reluctant to give the human rights a wider scope and meaning than a national court in the same situation would have done in order to interfere with the sovereign powers of the Member States no more than is absolutely necessary. International human rights courts and other similar institutions, therefore, tend to be rather conservative in the interpretation of human rights.

3/79 Treaties other than the ECHR generally have a much less effective enforcement system. The Inter-American Court of Human Rights, for example, has only received consent to its jurisdiction by a few states, whereas the jurisdiction of the ECtHR is accepted and respected by all Member States of the ECHR. Moreover, international courts – unlike the ECtHR – are generally open only to states as complainants and not to individuals. Finally, even if international courts are in some cases granted jurisdiction to render judgments against nations violating human rights, there is no international executive power to enforce such orders. Some human rights treaties have not established any specific courts or other enforcement institutions. Consequently, international human rights law, like almost all public international law, must rely heavily on voluntary compliance by states, buttressed by moral or other types of pressure that other nations are prepared to exert.

3/80 One way of examining enforcement or implementation options is in terms of the »level« at which enforcement or implementation occurs. International human rights obligations can be implemented, first, within the national systems of the state concerned (the ECHR is, for instance, directly applicable before and by the national courts of the Member States), secondly, by other states in the course of international relations (one state trying to directly exercise its influence on the violating state) or, thirdly, by international bodies (institutions like international courts, commissions or committees created by the human rights convention to deal with complaints by states, human rights organisations and/or individuals).

1. Enforcement within the national system

3/81 The easiest and most effective way to implement human rights is via one's own domestic legal system. As in all other fields of public international law, direct applicability of an international norm in the national legal system (see no. 3/13 et seq., above) accords the strongest protection to the bearer of the rights, namely, the individual. But not all international human rights treaties provide for direct effect; the ECHR, however, is directly applicable by national courts.

2. Enforcement in the course of international relations

3/82 Enforcement can also occur at interstate level. Thus, one nation may express disapproval directly to another nation with regard to the latter's alleged breach of human rights obligations and can bring formal or informal diplomatic pressure to bear on that nation to cease such violations. The United States, for example, has employed »quiet diplomacy«, public criticism and denial of military and economic assistance in attempts to persuade other nations to conform to their international human rights obligations.

3. Enforcement by international bodies

3/83 Enforcement can also occur at the level of international organisations. There is a variety of international forums in which complaints of human rights violations can be raised, either by states or, in some cases, by individuals. Examples are:

- the ECtHR established under the ECHR (see no. 3/94 et seq., below),
- the institution of the American Human Rights Convention and,
- state complaints under the International Covenant on Civil and Political Rights.

3/84 Some international institutions – for instance UN bodies including the General Assembly, Security Council, Human Rights Council, or Council for Namibia, the Inter-American Commission on Human Rights, and the review conference periodically held under the provisions of the Helsinki Accord – are empowered to consider human rights matters on their own initiative without any formal state-to-state or other complaint.

VI. The problems of human rights

3/85 The main treaties and declarations of international human rights are frequently criticised for their Western individualistic approach to the topic of human rights. This reflects the difficulty in reaching agreement as to the nature and content of fundamental human rights among the more than 190 nations of the world with different cultures, religions, political systems, and ideologies, and at different stages of economic development.

3/86 Differences in perspective have emerged in the past, for example between Western nations, which have generally emphasised the importance of civil and political rights, and the developing and socialist nations, which have generally emphasised the importance of economic and social rights. Typical individual social and economic rights are labor law rights, rights to a certain minimum income, to social security, to affordable medical treatment, and to a healthy environment. The demand for economic and social fundamental rights can be explained with reference to the fact that individuals can only take advantage of their political and civil freedoms if they possess the appropriate economic and social means. For example, the respect for private property and the freedom of profession are without meaning for people who have no property and no chance of employment. At an international level, there is growing agreement that human rights must be considered in their entirety and that civil, political, economic, social, and cultural rights are closely linked.

3/87 This is related in part to the practical obstacles to the enforcement of social and economic rights: In the Austrian legal system, there are no fundamental social or economic rights; ordinary Austrian statutory law, however, provides for a certain standard of social benefits, as well as for the protection of employees, tenants, and consumers, and the support of the unemployed. But there is no fundamental right enabling citizens or individuals to demand that protection and support from the Austrian state. This is explained by reference to the limited means of the state to provide economic and social benefits. It would, for instance, not make sense for an individual to exercise a right to employment against the state because most jobs are not created by the state but, rather, by the private sphere, over which the state has no direct control. The granting of social benefits is considered a political question, not a legal one. Law is, therefore, not intended to restrict the political discretion of the legislature and the government to grant certain benefits or by imposing on it the obligation to meet fundamental individual rights to such benefits. In developing countries the pressure to provide a certain level of basic social and economic welfare to the citizens is much stronger than in many Western states like Austria, as the citizens of the former countries are more likely unable to take advantage of their civil and political rights as a result of economic constraints. But here again, albeit for very different reasons, the enforceability of social and economic rights faces obstacles: citizens of less wealthy countries who are granted fundamental socio-economic rights against the state may well struggle to have these rights realised given the limited economic means of the state itself.

3/88 Some nations have pressed for greater recognition of »collective« human rights, such as the right of self-determination, the right to development, and right to peace. Others, however, regard »collective« human rights as ill-defined and inconsistent with the concept of individual human rights. More generally, they express concern that international organisations have tended to label too many aspirations as »human rights«, which in turn detracts from the concept of human rights as a claim of individual freedom and dignity against the authority of the state.

3/89 Can one expect government officials to support human rights objectives and efforts impartially even if this poses foreign policy risks, or will they in practice only give such support selectively, when it serves their nation's pragmatic policy interests? It is apparent that many states apply a »double standard« in their attitudes towards human

rights, harshly condemning violations by political opponents, but ignoring equally serious violations on the part of nations with whom they wish to maintain good relations (for political or economic reasons). An example of the application of this double standard is the position of the US vis-à-vis human rights violations by Russia, China or Iraq.

3/90 Can one hope that through public international law and institutions the way that governments behave towards their own citizens can be positively affected or do the roots of repression, discrimination, and other denials of human rights lie in deeper and more complex political, social, and economic problems? And as humanity faces an increasingly uphill struggle against the relentless pressures of population growth, resource depletion, environmental degradation, and economic scarcity, can one ever hope to ensure conditions of economic well-being in which social competition will become less intense and human rights can flourish?

3/91 These problems must be taken seriously. It is neither realistic nor useful to pretend that public international human rights law can produce an immediate change in the way human beings and their governments behave or that it can facilitate speedy, dramatic improvement in the human condition. But there is some basis for modest optimism. For example, it is evident that the concept of international human rights has taken firm root and has acquired significant momentum. Even if governments do not often take international human rights seriously, the citizens of countries throughout the world are aware of these rights and do take them seriously. Even though in some cases governments have employed international human rights concepts hypocritically and for selfish political purposes, overall, their actions have served to reinforce human rights principles and establish important and continuing precedents. International human rights institutions have been established which, once in place, have acquired their own momentum independently of the states which established them, expanding their human rights activities in ways that governments are unable to curb. A few significant victories have been won and many small advances have been made. At least, international human rights law has succeeded in exerting some checks on government actions and largely managed to curb an increase in human rights violations.

? What are different types of sources of international human rights? What is meant by the term »soft law«?

Which international treaties containing international human rights do you know? What is the legal character of the Universal Declaration of Human Rights? Does the Universal Declaration contain civil and political human rights, economic and social human rights or »collective« human rights?

Where can you identify the application of human rights in the Austrian domestic system? Are all these rights »human rights« in the sense that they are granted to Austrian nationals as well as foreign citizens? Are there any economic and social fundamental rights in the Austrian system or »collective« human rights?

What is the main effect of international human rights with respect to states? Can human rights only be enforced against states or also against private persons or groups of private persons?

Human rights are created to benefit individuals, i.e. private persons (except »collective« human rights). Can those private persons who find their international human rights violated always enforce their human rights themselves? Where can they enforce them (if they can)? How (where) can one enforce a human right based on the ECHR against the Austrian state? How (where) can one enforce a human right based solely on Austrian constitutional law and not on the ECHR against the Austrian state?

What are the reasons for not including directly enforceable economic and social human rights in the constitutions of states or in international treaties that are directly enforceable? What are the reasons not to include collective human rights in the various human rights instruments?

Why is the protection of human rights in public international law not as effective as one would wish? (Think of enforcement problems, the attitudes of states, and economic, social and other reasons for the violation of civil and political human rights by states, etc.)

VII. Theory in practice: Human Rights and Mass Media

A. The Mass Media as the ›fourth estate‹

In the following chapter we will discuss a specific problem within the realm of Human Rights. The technique (»Theory in Practice«) employed

in this chapter – in which changing your point of view might evolve your understanding of the underlying legal problems – is hugely successful when discussing supranational legal paradigms (see no. 1/73, above).

Thomas Carlyle (1795–1881) described the power of the press as »the fourth estate« in 1841. He elaborated in his famous book »Heroes and Hero-Worship« that »there were three estates in Parliament; but, in the Reporters' Gallery yonder, there sat a fourth estate far more important than they all. It is not a figure of speech, or a witty saying; it is a literal fact.«

Since Carlyle, the »fourth estate« has traditionally been regarded as one of the classic checks and balances in the division of powers, or as Thomas Jefferson said, »Where the press is free and every man able to read, all is safe.«

3/92 Unsurprisingly all Western states' constitutions contain provisions respecting rights to freedom of speech and the freedom of the media. The rights granted by supranational conventions (see no. 3/74 et seq., above) serve the same intentions. The guarantee of freedom of expression is recognised as a basic human right in the Universal Declaration of Human Rights adopted by the UN in 1948 (see no. 3/70, above) and – most important to our European perspective – in the European Convention on Human Rights.

3/93 The ECHR borrowed almost word for word from Art 19 UDHR to construct art. 10(1) ECHR – it provides that »everyone has the right to freedom of expression. This right shall include to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.«

B. Enforcement under the ECtHR regime

3/94 Due to three peculiarities of the Convention, it seems correct to assume that the findings of the European Court of Human Rights (ECtHR) dealing with the ECHR have the final say in any questions relating to the mass media.

3/95 Firstly, the ECHR requires the Signatory States of the Council of Europe to provide an effective remedy against human rights violations; see in this regard art. 13 ECHR: »Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy

before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.« Amongst the instruments used by the Signatory States to discharge this duty to provide for an effective remedy are tort and criminal law.

Secondly, any such remedy must be provided regardless of whether **3/96**
the violation was due to governmental, corporate, or an individual's conduct. Violations, and accordingly remedies, concern not only the »vertical« relationship between public body and individuals, but also the »horizontal« relationships between individuals.

Thirdly, and in stark contrast to the enforcement of other treaties **3/97**
of public international law (see no. 1/11 and 3/22, above), the rights enshrined in the ECHR are not limited to inter-state affairs, but are open to court actions by citizens of Signatory States; applications to the ECtHR against Signatory States can be made by any individual citizen of a Signatory State.

As a result of these three characteristics, affected citizens and me- **3/98**
dia outlets can bring any noteworthy action in civil or criminal law to the ECtHR, alleging that the Signatory State does not provide an effective remedy for violations of freedom of expression; any national law in which the ECHR's jurisdiction is engaged is ultimately measured and interpreted against the standards of the ECHR, against which the ECtHR will carry out a very careful scrutiny of interferences with press coverage and publications.

C. Protection of the Press

The ECtHR has interpreted art. 10 para. 1 ECHR broadly and inclu- **3/99**
sively; no attempt has been made to restrict those who are entitled to rely on art. 10 ECHR, and »everyone« does indeed mean »everyone«, including publishers, newspapers, and journalists.

The ECtHR has frequently emphasised that the freedom of expres- **3/100**
sion extends to the freedom of the press, as the latter arguably affords the public one of the best means of discovering and forming an opinion on the ideas and attitudes of their political leaders.

The ECtHR highlights this special nexus when describing the role of the mass media as a »public's watchdog«. Concordantly, not only the

substance of the ideas and information expressed, but also the form and means of dissemination by which they are conveyed is protected. The ECtHR has delivered many judgments declaring that national laws or court decisions have infringed art. 10 ECHR and has begun to develop a jurisprudence tailored to the particular needs of the news media. Over the years, it has crystallised its freedom of expression case law into a number of basic principles.

Arguably the most important one was formulated in 1976 in Handyside v. United Kingdom, ECtHR 07.12.1976, no. 5493/72 where the ECtHR held that: »Freedom of expression … is applicable not only to »information« or »ideas« that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb.«

3/101 Given the specific reference to »opinions«, art. 10 ECHR protects the right to criticise, speculate and make value judgements. As a result, polemic, aggressive, exaggerated, provocative and even insulting expressions have been found to fall within the scope of art. 10 ECHR and, with regard to the press, it results in a situation where opinions are not delivered in a sensitive manner, but more often than not in a most insulting manner as »comment is free«.

As the press is seen as the »public watchdog«, this already significant latitude in communications is extended even further for publications criticising politicians. The free speech infringements most commonly struck down have been in relation to those who wield political power. Here the ECtHR grants a very extensive freedom to comment upon their performance.

In the case of Peter Lingens v. Austria, ECtHR 08.07.1986, no. 9815/82, who accused the Austrian Chancellor of »the basest opportunism« and »immorality« for seeking a political alliance with a party led by a right-wing politician, the ECtHR declared that »[t]he limits of acceptable criticism are accordingly wider as regards a politician than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.«

In essence, politicians, when acting in an official capacity, run the risk that their reputations may be sullied in the most reprehensible manner in the interests of open discussion on political issues. Additionally, the ECtHR may take into account the prior conduct of a politician: If he or she has been party to harmfully worded attacks on political opponents, he or she cannot expect delicate treatment in return. **3/102**

This was, for instance, the case in a provocative attack on the politician Jörg Haider (1950–2008), where a journalist – accusing Haider of openly endorsing Neo-Nazi attitudes – was protected from private prosecution. The ECtHR emphasised that a »greater degree of tolerance« must be applied in respect of a politician, »especially when he himself makes public statements that are susceptible of criticism« (Oberschlick v. Austria, ECtHR 23.05.1991, no. 11662/85).

To sum up, the ECtHR allows journalists massive latitude in their method of presentation, including exaggeration or even provocation. The scope for comment on wielders of political power is even wider than that for private individuals; the need for open comment on politics is seen as prevailing over the protection of reputation. **3/103**

D. Reporting of Facts

Of course, the mass media are not only concerned with commenting on politics; their real bread and butter is the reporting of facts. Where journalism is concerned with objectively verifiable statements of fact, their validity is crucial to the recipient. Phrased in terms of law: Does an untrue statement of fact give rise to liability of the media outlet and the journalist? In the Goodwin v. United Kingdom, ECtHR 11.7.2001, no. 28957/95 decision, the ECtHR answered this question in the negative when it held: »The safeguard offered … to journalists in relation to reporting on articles of general interest is subject to the proviso that they are acting in good faith …«. In other words, journalists are entitled to fight any claim brought against them if they merely acted in good faith. Arguably with a view to the urgency in reporting news, the journalist has merely to fulfil the duty to endeavour to report as truly as possible; the requirement of diligent information is sufficient. The **3/104**

second core principle in this context, i.e. »the reporting on articles of general interest«, was set forth in Bergens Tidende v. Norway, ECtHR 2.5.2000, no. 26132/95.

The failures of a local surgeon in inserting breast implants were highlighted in a newspaper article, and his incompetence was pilloried. In reality, the surgeon was not even remotely inept; he had conducted thousands of successful cosmetic operations. Obviously the article had clearly damaged his professional reputation, resulting in pecuniary loss. Nevertheless, the ECtHR submitted that this was not sufficient to override the freedom of the press to impart information on a matter of public concern, as the newspaper had reported on an important controversy relating to public health.

3/105 With regard to statements of fact, two lessons can be learnt here. First, in the view of the ECtHR, no absolute duty to establish the truth of a report can be imposed on the media. Facts are only to be verified as far as reasonable and appropriate. Second, the ECtHR is inclined to make a broad-brush public interest judgement.

E. Limitations applicable

Let's change perspective! Oscar Wilde (1854–1900) wrote – in another era, certainly, but his words still resonate – that »the public have an insatiable curiosity to know everything, except what is worth knowing.«

3/106 From this perspective, the assumption of the strong position supporting mass media seems to be unfounded. Crucially, freedom of the media is not an end in itself, and the sentiments behind art. 10 para. 1 ECHR are subject to a number of exceptions contained in art. 10 para. 2 ECHR.

»The exercise of this freedom, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic

society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.«

When do any of the exceptions override the freedom of expression and, accordingly, the freedom of the press? Only when the state providing a restricted remedy against the violation of expression can rebut the presumption of art. 10 para. 1 ECHR erected in favour of free expression. **3/107**

In the words of the ECtHR in Observer and Guardian v. United Kingdom, ECtHR 26.11.1991, no. 13585/88: »This freedom is subject to exceptions, however these must be strictly construed and the need for any restrictions must be established convincingly.«

On this basis the »burden of proof« is reversed. First, the Signatory State defending the restriction of freedom of expression bears the burden of proving its »necessity in democratic society«, which in turn implies the existence of a »pressing social need« for the restriction in question. But even when social needs are found »pressing«, they are not per se overriding, as, secondly, the ECtHR held that »[e]ven when the social need is pressing, the particular infringement, looking at the context and the content of the banned communication, must be »proportionate to the legitimate aims pursued« and the Government bears the burden of passing the proportionality test by adducting sufficient reasons«. This »proportionality test« is important – it means that the ECtHR will strike down the restriction in question if its particular application or an aspect of it is nonetheless so disproportionate as to breach the Convention. This is so if, in all the circumstances of the case, the restriction was ineffectual in advancing the value contained in an art. 10 para. 2 ECHR exception, or was irrelevant to it, or insufficiently justified. The ECtHR proceeds in this regard on a case-by-case basis. **3/108**

For instance, in Tolstoy v. United Kingdom, ECtHR 13.7.1995, no. 18139/91, the ECtHR held that, although the law of civil libel might in general terms respond to the social need to protect reputation from untruths,

the lack of proper judicial control over damages at that time lacked all proportion and constituted a breach of the Convention.

3/109 Having addressed the high standards for any restriction of the freedom of expression, it seems useful to scrutinise more closely some of the explicitly mentioned values in art. 10 para. 2 ECHR. For the first value, the restriction to protect one's »reputation« in relation to the publication of value judgements, we can only refer to the principle already mentioned (see no. 3/101, above), namely »comment is free«. The restriction is only ever available when the opinion published amounts to an abusive insult without any meaning for a public discourse on the topic – a standard hardly ever found in any sizeable media outlet.

3/110 As explicitly mentioned in art. 10 para. 2 ECHR, the rights or freedoms granted by the ECHR to the other party may restrict the right to freedom of expression. This includes the most important right to respect for private and family life under art. 8 ECHR.

Resonating with the aforementioned quote of Oscar Wilde, this frequently concerns public figures such as politicians, leading businessmen, artists, sportspeople, entertainment stars and actors, as the public seems keen to gather extensive information on their private lives.

3/111 The leading case in this regard is Caroline von Hannover v. Germany, ECtHR 24.06.2004, no. 59320/00, where pictures were published depicting this member of the Monacan monarchy in everyday situations such as playing sports, walking, on holiday and having dinner with friends.

The German Federal Constitutional Court (BVerfG, Bundesverfassungsgericht) held that Caroline, as a public figure of contemporary society, enjoyed the protection of her private life even outside her home, but only if she was in a secluded place out of the public eye »to which the person concerned retires with the objectively recognisable aim of being alone and where, confident of being alone, behaves in a manner in which he or she would not behave in public.« The Constitutional Court attached decisive weight to the freedom of the press, even the entertainment press, and to the public interest in knowing about Caroline's private life.

In contrast to previous case law, which was largely in favour of the media, the ECtHR disagreed and placed significant emphasis on the protection of privacy. It held that any violation of the right to respect for private and family life is only justified when the published photographs and articles make a contribution to a debate of general public interest. As Caroline exercised no official function, the photographs and articles related exclusively to details of her private life and made no such contribution to any public debate. **3/112**

The ECtHR concluded that the German courts had not struck a fair balance between the freedom of expression and the right to respect for private and family life, and, therefore, that art. 8 had been violated. Thus, the decision of the German Federal Constitutional Court was revised and Caroline was ultimately awarded a considerable sum in damages.

The ECtHR's approach, to which the Signatory States must adhere, had considerable implications for the tabloid press in Europe, and in an immediate reaction German chief-editors composed an open letter to the German chancellor heralding the end of western democracy as known if the censorship prescribed by the ECtHR was not stopped. They argued that, as a result of the judgment, the hands of all serious journalists were tied and that they would now be prevented from rapping the knuckles of powerful people.

To sum up, three conclusions must be drawn regarding restrictions on the freedom of expression of the mass media. Firstly, restrictions of an opinion are hardly available. Secondly, the latitude for the mass media in standards of publication of facts is under pressure. European legal science no longer accepts lax duties on journalists when disseminating false information. Finally, the ECtHR makes exceptions to freedom of expression when the right to private and family life is violated and the resulting publication does not contribute to a relevant public debate but satisfies only the prurient interests of the consumer. **3/113**

How is the media protected by the ECHR? Which limitations apply?

What is the difference between the statement of facts and an opinion?

VIII. Current and future challenges to public international law

A. From a state-oriented to a community-oriented approach

3/114 It may be argued that the most significant development in the field of public international law in the post-war period after 1945 is the addition of a new and growing field of international cooperation and organisation to the traditional system of the law of nations. Traditional international law had strong liberal individualistic features. It was a law created by, and for, prosperous nations. The primary purpose of this law was to reconcile the freedom of one state with the freedom of another state. The main problem during the eighteenth and nineteenth centuries, when the law was developed, was to ensure peace between states which operated largely independently of one another and evolved their policies within the framework of traditional diplomacy.

3/115 Now, however, technological revolution has transformed international society into a fully interdependent world community in times of both peace and war. This development led to the proliferation of international organisations for cooperative purposes. Unlike the League of Nations, the United Nations family of organisations was not conceived mainly as an organ to facilitate the settlement of international disputes but, rather, as one to promote co-operation in all fields. The numerous specialised agencies of the United Nations and other international organisations, both at regional and universal levels, marked the transition of public international law from the traditional system of formal rules of mutual respect and abstention among sovereign states to a system of organised joint efforts for co-operation. These international organisations deal with such diverse subjects as international monetary control, international development aid, problems of food production and distribution, universal standards of health, co-operation in means of communication, control of environmental and marine pollution, and the unification of international trade law (see no. 2/99 et seq., above), etc.

3/116 The dramatic increase in the number of new states in the international community has accounted for important new developments in public international law and has seen a significant increase in both its scope and complexity. The large majority of the new world community

comprises underdeveloped nations which are in some instances dependent on assistance from the rest of the world community. Traditional public international law focused on co-existence and diplomatic relations unconcerned about the divergences of the social and political systems. It was based on respect for national sovereignty, observance of promises, and the right to use force in pursuit of national objectives. Its new focus, however, is on developing a law of cooperation, social justice and welfare, whereby states actively collaborate at different levels for the common welfare of all mankind. In other words, public international law has passed from the phase when it was primarily a law of co-existence to a new law of cooperation. The paradigm of public international law is gradually changing from a »state-oriented« to a »community-oriented« approach. As we have seen in no. 3/5 et seq., above, this »community-oriented« or »cooperation-oriented« approach is supplemented by the direct inclusion of the individual in the sphere of operation of international law. The extent of such inclusion of private persons is at its greatest in highly integrated international organisations like the EU. But it can also be observed in public international law more broadly.

3/117 The establishment of a community of nations in which the states surrender a significant portion of their sovereign powers to a supra-national community is, however, not yet a reality. Nevertheless, increasing movement in this direction is reflected in all fields of public international law. In contemporary public international law, elements of the old state-oriented approach and of an incipient community of nations thus co-exist.

3/118 One can view the gradual change of public international law from a state-oriented approach to a community of nations from various perspectives.

3/119 The traditional public international law of co-existence with its main independent actors – states – frequently borrowed concepts from private law. Private parties concluding contracts enjoyed a wide range of freedoms – at least according to the liberalistic concept of private law dominant in the nineteenth century – which could be considered similar to the freedom and independence of sovereign states in their relations to each other. The concept of an »international treaty«, therefore, draws heavily on the private law concept of a »contract« between individuals. And the requirements for the development of customary public international law (»repeated practice« and »opinio juris«) are derived from the concept of customary law in private and commercial law.

3/120 It is not a coincidence that contemporary public international law, which focuses heavily on the gradual construction of a constitution for the community of nations which will reduce the sovereign powers of states, finds its analogies in public law, particularly constitutional law. This is particularly evident in the use of the implied-powers doctrine of US constitutional law to construe the rules of competence in the charters of international organisations, and in a general comparison of the charters of highly integrated international organisations to the constitutions of national states.

3/121 Amongst jurists and politicians, there are differing views on where contemporary public international law is positioned between the two poles of exclusive state-orientation and a powerful community-orientation. Some – one could arguably refer to them as realists – regard the state-oriented approach as still being dominant with only weak influence of a community-orientation approach. According to that view, in cases of doubt or where no clear rule of public international law demanding community-orientation exists, public international law in no way diminished the sovereign powers of states. States are accordingly justified in acting along the lines of the old state-oriented approach.

3/122 Others – one could call them idealists – argue that the international actors (that is, states) should emphasise the incipient community-orientation of public international law whenever possible. Therefore, in cases of doubt or where no clear rule of public international law demanding community-orientation exists, states should infuse a community-oriented approach. The state should downplay their sovereign interests and act in the interests of the wider community of states, thereby promoting the creation of such a rule and enhancing the development of public international law into a more community-oriented direction.

3/123 An excellent example contrasting the realistic state-oriented and the idealistic community-oriented approach is the use of self-defence and the system of collective security, as described in no. 3/58 et seq., above: when are states – according to contemporary public international law – allowed to make use of military force in self-defence? The realists would argue that military force plays the dual role of opposing a severe threat of disorder and providing an indispensable antidote to disorder in international relations (military force or the threat of the use of military force as a means to deter the use of military force on the other side which, in turn, acts as a means to secure peace and a policy of deterrence). Order will prevail if (state) power checks (state) power.

On the other hand, in an idealistic system, the possession and use of power would not be eliminated but centralised. Public international law would express the concern of the community for control of disorder by prohibiting the (illegal) use of military power by states and vesting the authority to use or cause the use of law-enforcing military power (concept of »collective security«, see no. 3/58 et seq., above) in community organs. The United Nations Security Council represents a first attempt to realise such an ideal system of centralised military power. But it is far from being effective, as illustrated by numerous incidents of war during the last decades. It can, therefore, be said that no such »ideal system« exists at the international level at present. Realists are not concerned with how to achieve this end but, rather, with how best to proceed in its absence, that is, via the use of military force by states (in self-defence) against states that unlawfully make use of their military powers. **3/124**

What changes in the functions of public international law can be observed in the twentieth century?

What are the reasons for these changes?

What are the main aims of public international law today and what are the fields of its activities?

Why does the traditional approach of public international law share similarities with the concept of freedom of contract (private law) whereas the modern approach has similarities to concepts of public law? ?

The present position of public international law is somewhere between state-orientation and community-orientation. What would be the »realist's« view on this situation?

What would be the »idealist's« view on this situation?

B. Reforming the United Nations system

Due to the new and diverging global issues and challenges that the United Nations face in the 21st century, a thorough reform of the UN organisation and its capacities is required. Arguably, the restructuring and upgrading of the UN would greatly enhance its relevance and effec- **3/125**

tiveness, and has thus been a priority concern of the Member States, as well as of the current Secretary-General, Ban Ki-moon, and his predecessor, Kofi Annan, for several years now. Due to increasing global interdependences, the maintenance of peace, security and development cannot be achieved without multilateral cooperation.

At the 2005 World Summit, then Secretary-General Kofi Annan outlined in his report »In Larger Freedom« several areas in which the UN needs to advance and emphasised the importance of collective action:

»In a world of interconnected threats and challenges, it is in each country's self-interest that all of them are addressed effectively. Hence, the cause of larger freedom can only be advanced by broad, deep and sustained global cooperation among states. Such cooperation is possible if every country's policies take into account not only the needs of its own citizens but also the needs of others. This kind of cooperation not only advances everyone's interests but also recognises our common humanity.«

3/126 According to this report, one area which requires particular attention is that of developmental challenges. Priority areas, designated as such by Kofi Annan, are the enhancement of national development strategies by developing countries and the securing of the financing of development by developed countries. The fulfilment of the Millennium Development Goals (MDG) is also central to this agenda. Given that, in particular, the majority of African countries are still far from attaining the MDG, the Secretary-General of the UN launched a partnership arrangement (MDG Africa Steering Group) in 2007 tasked with, amongst other things, the improvement of aid predictability to facilitate more effective long-term planning for African governments and the creation and identification of synergies at country level.

3/127 Other areas that need attention are the collective security system of the UN, improvement in the overall maintenance of peace and security, as well as the changing face of humanitarian crises. It is generally known that the current range of threats and security challenges includes not only open conflict, but also poverty, infectious diseases, environmental degradation, terrorism and transnational organised crime. In order to address these challenges efficiently, the UN needs to improve its ability to play its role in conflict prevention, peace-making,

peace-keeping and peace-building. Hence, the Department of Peacekeeping Operations will be restructured in order to provide more effective mission management, and supplemented by Field Support, which will offer logistical, personnel and financial support. Partnerships with other UN and non-UN actors, especially regional organisations, will be fostered. This will include reinforced presence of the UN on the ground. Besides international and internal conflicts, organised crime and acts of terrorism endanger global development and the lives of people worldwide. Therefore, the securing of peace and security also comprises the UN Global Counter-Terrorism Strategy, which includes the creation of global legal foundations and joint actions to prevent terrorist acts. As far as other humanitarian crises are concerned, extreme weather and climate change require enhanced attention by the global community. UN measures in this area focus on effective communication and joint training on disaster preparedness and response.

3/128 The further dissemination and acceptance of human rights, especially through the expansion of the work of the Office of the High Commissioner for Human Rights (OHCHR), is also on the agenda of the UN. Several objectives in this area have already been achieved: the presence of the OHCHR in almost 50 countries; the creation of the Human Rights Council, which replaced the Human Rights Commission as it was suffering from declining credibility and professionalism, and the establishment of a Special Representative for the Prevention of Genocide. Whether these modifications will actually improve the global human rights situation and create long-term improvements remains to be seen.

3/129 Finally, the management and structural reform of the UN, which should result in an ameliorated application of resources and staff, is continuously at the centre of global interest. Since the 1990s then-Secretaries-General Boutros-Ghali and Annan struggled to reform the Secretariat, reduce costs and improve internal and external communication. After the 2005 summit additional steps were taken to render the Secretariat, as the administrative centre of the UN, more mobile and multi-skilled, for instance by limiting the amount of time a staff member can spend in the same post and facilitating career advancement. A new decentralised system of internal justice, which is designed to address work-related conflicts and includes an Ombudsman's office, has also been in place since July 2009. Unlike its predecessor, the newly created first-instance body can issue binding decisions that are open to

appeal. However, other changes that were envisaged by the Secretary-General in 2005 (and before) are still far from being realised. This includes in particular the reconfiguration of the Security Council which, in its current form, no longer represents the realities of power in today's world and faces significant difficulties in decision-making due to the veto-power of the permanent members.

3/130 When considering the need for reform of the UN system, given its inefficiency and assertiveness, one should always keep in mind that the UN is a complex, multicultural system consisting of over 190 Member States, each with its own particular point of view on how issues should be handled in international relations. In this sense, the unique character and constitution of the UN inherently entail limitations.

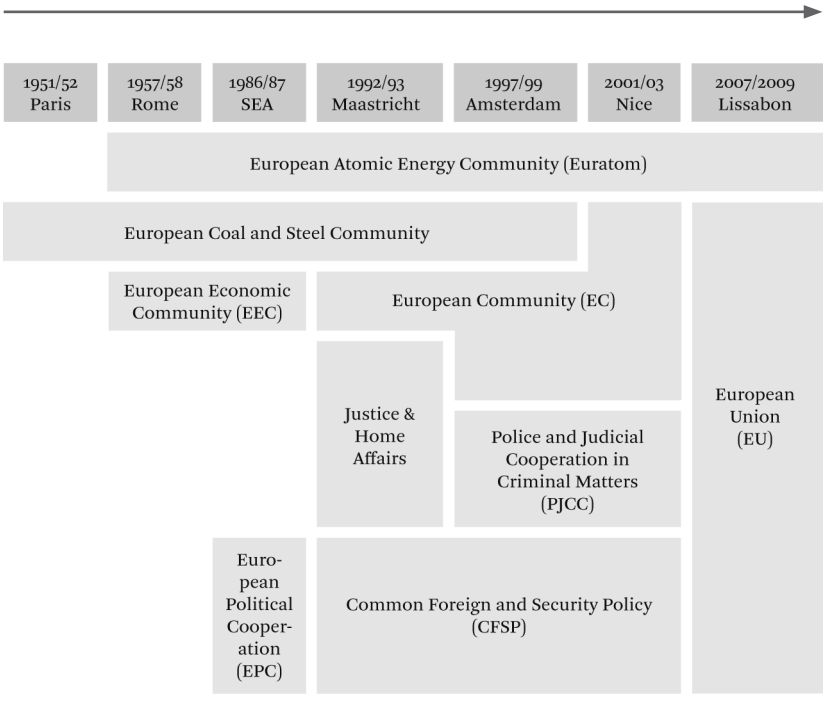

Figure 17: Timeline of EU Law.

Chapter 4

European Law

I. What is the European Union?

The European Union (EU) is a community of public international law whose actions are governed by two treaties: the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (see no. 1/21 et seq., above). The TEU and the TFEU were amended by the Treaty of Lisbon, which entered into force on 1 December 2009. Due to the growing number of Member States and the consequential deficiencies of the Treaties, especially with regard to the institutional framework and the decision-making process, the latest amendment was deemed necessary to preserve the operability of the EU with 28 Member States. Additionally, the Treaty of Lisbon abolished the European Community (EC) as a distinct organisation; now, instead of two organisations (EU and EC) only the »new« European Union (EU) remains, which, in addition to its original tasks, has now also absorbed the tasks and competences of the EC. For the timeline of EU Law please refer to figure 17 on the prior page. **4/1**

Since the Treaty of Lisbon, the EU has explicit legal personality. This means that the EU, just like states or certain international organisations, can act as a legal entity of public international law and can, for example, conclude international agreements with other states or international organisations of its own accord. **4/2**

The aims of the EU are cited in art. 3 TEU. They are as follows: **4/3**

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1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with

respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

   It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

   It shall promote economic, social and territorial cohesion, and solidarity among Member States.

   It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

4/4 Likewise, art. 2 TEU applies to all elements of the EU:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The objectives and values cited in artt. 2 and 3 TEU comprise all activities of the EU. **4/5**

Since 2009 the Charter of Fundamental Rights of the European has equivalent legal value as the Treaties. Its catalogue of fundamental human rights is thus legally binding on the EU. The organs of the EU may also be obliged to consider the European Convention on Human Rights (ECHR) and the fundamental rights common to all Member States in the exercise of their roles. **4/6**

Due to an additional protocol to the ECHR enabling the EU to accede to the Convention together with art. 6 para. 2 TEU which permits the EU to accede, the accession of the EU as a party to the ECHR was discussed and a draft agreement has been reached.

Notably, the CJEU delivered an opinion in December 2014 where the court assesses whether the legal arrangements proposed in respect of the EU's accession to the ECHR are in conformity with the requirements laid down in the Treaties and submits that they are not for five principle reasons: Firstly, the Court holds that the draft agreement reached thus far does not take into account the specific characteristics and autonomy of EU law as it does not restrict Member States having the possibility to apply higher human rights standards than the EU Charter. Additionally, the Court holds that the draft agreement would »require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States.« The Court continues that in this manner »accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law«. Moreover, the Court submits that the agreement, if implemented, would circumvent the preliminary ruling procedure under art. 267 TFEU as the draft agreement did not rule out that national courts could ask the ECtHR to rule on EU law issues under Protocol 16 of the Convention. Further, the Court highlights that the draft agreement allows for the possibility that the EU or Member States might submit an application to the ECtHR, under art. 33 of the ECHR, concerning violations in conjunction with EU law. According to the Court this would violate art. 344 of the TFEU, which gives the CJEU monopoly on inter-state dispute settlement regarding EU law between Member States. Thirdly, the co-respondent mechanism allowing for the EU and a Member State to intervene in an ECtHR case would allow the ECtHR to interpret EU law when assessing admissibility requests as well as the criteria for the attribution of their acts or omissions. According to the Court this would risk adversely affecting the division of powers between the EU

and its Member States. Fourthly, in terms of the »prior involvement« procedure in the draft agreement, the CJEU notes that the draft agreement allows the ECtHR to rule on whether the Court has already given a ruling on the same question of law, something which is solely within the CJEU's competence. Finally, the draft agreement would allow the ECtHR to rule on the compatibility with the ECHR of certain acts, actions or omissions performed within the context of the Common Foreign and Security Policy (CFSP). Consequently, the Court holds that the ECtHR, a non-EU body, would have exclusive judicial review of CFSP acts, actions or omissions, which would go against the CJEU's previous finding that »judicial review of acts cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU.«

In light of this reasoning the CJEU finds that the draft agreement is not compatible with art. 6 para. 2 TEU on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

4/7 Artt. 2, 7 TEU provide for a procedure to assess severe and persistent violations of one or more of its principles which can result in the suspension of membership rights, including voting rights. The Council can declare, on the basis of a proposal by one third of the Member States, of the Parliament or with a majority of 4/5 of the Commission's members as well as with the additional consent of the Parliament, that a clear risk of a severe violation of fundamental rights by a Member State exists and can approach that Member State with suitable recommendations to rectify the situation. The exclusion of a Member State is, however, not foreseen by the Treaties. In any case, according to art. 49 TEU, compliance with these principles and values is a requirement for a state's admission into the EU.

4/8 As already mentioned, the EU has legal personality vis-à-vis Member States and has the same legal capacity granted to legal entities by national law within these national legal systems. It is globally recognised as being a subject of public international law. In fact, however, its status as a subject of public international law extends only so far as necessary for the performance of its tasks and achievement of its aims. The subject of legal personality and legal subjectivity is the EU itself and is represented by its organs.

4/9 Although artt. 3 et seq. TFEU primarily stipulate the competences of the EU, these provisions also provide an overview of the policies and

activities of the EU. One of the most important activities is the establishment of an internal market characterised by the abolition of obstacles to the free movement of goods, persons, services and capital between Member States and the establishment of a system ensuring that competition in the internal market is not distorted. Additionally, many other policies exist in the fields of agriculture, protection of the environment, consumer protection, health protection, transport, the promotion of research and technology, and economic, social and territorial cohesion.

4/10 Despite a large field of EU activities and policies, the EU is only permitted to act within the boundaries of the objectives set and competences assigned to it by the Treaties. According to this »principle of conferral« (that is limited singular competence), EU-organs can only act within the limited areas of competence assigned to them by the Treaties. In other words, no general competence for EU organs exists which would allow them to act at their discretion whenever they deemed it fit.

4/11 There are three different categories of competences of the EU mentioned in artt. 2 et seq. TFEU: exclusive competence (art. 3 TFEU), shared competence (art. 4 TFEU) and supporting, coordinating and complementary competence (artt. 5 and 6 TFEU). In general, any competence conferred to the EU, which is not an exclusive or supporting competence, is a shared competence regardless of whether it is mentioned in art. 4 TFEU or not. In areas of exclusive competence of the EU – for instance, customs, the common commercial policy and the monetary policy for the Euro countries – only the EU may legislate and adopt legally binding acts. The Member States are no longer competent to legislate in these areas with the logical exception being legislation required to implement an EU directive.

4/12 In matters of shared competence – for instance, internal market, environment, energy and consumer protection – both the EU and the Member States are authorised to act. However, once the EU has exercised its competence by the way of a directive or a regulation, the Member States' competence lapses. Nevertheless, whenever the EU is acting according to a shared competence, the so-called principle of subsidiarity in art. 5 para. 3 TEU applies. In the area of exercise of non-exclusive competences – being by far the largest set of competences – the EU is only authorised to act if it can be ascertained that the envisaged goals could not be sufficiently accomplished by the activity of the Member States alone and that these aims can be better achieved at

EU level. This principle of subsidiarity was initially introduced into the TEC by the 1993 Treaty of Maastricht. It was met with scepticism by the Member States with regards to the competences of the EU who felt that the competences granted were too extensive. Finally, art. 6 TFEU gives the EU the competence to carry out actions to support, coordinate or supplement the actions of the Member States.

4/13 The measures taken by the EU, according to the principle of subsidiarity or otherwise within the scope of exclusive competences, must also conform to the principle of proportionality. Accordingly, no measures may be taken that go beyond what is necessary.

4/14 According to the obligation to loyalty of the Member States enshrined in art. 4 para. 3 TEU all Member States are obliged to fully support the EU in the accomplishment of its tasks and to refrain from taking any measures which could endanger the realisation of the aims of the Treaties. This obligation to loyalty has always been construed inclusively by the CJEU and has, at times, been used by the CJEU as a basis for its own »quasi-legislative measures«.

The United Kingdom European Union membership referendum, commonly known as the Brexit referendum took place on 23 June 2016. The referendum resulted in a vote to leave the EU. In order to start the process to leave the EU, the British government will have to invoke art. 50 TFEU.

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.

II. The Organs of the EU

4/15 The organs of the EU, as listed in art. 13 TEU, are the European Council, the Council, the Commission, the European Parliament (EP), the Court of Justice of the European Union (CJEU), the European Central Bank (ECB) and the European Court of Auditors.

A. The European Council

4/16 The European Council is an EU organ concerned with the development of the EU. As stated in art. 15 para. 1 TEU, it is tasked with determining the general political directions and priorities for such development. It comprises all Member States' heads of state or government as well as the President of the Commission. The heads of state or government may request assistance by one of their ministers while the President of the Commission can ask a member of the Commission for assistance. Furthermore, since the Treaty of Lisbon, the European Council is presided over by a permanent President who is elected by a qualified majority and remains in office for two and a half to five years (art. 15 para. 5 TEU).

> Since December 2014 Donald Tusk is the President of the European Council. His tasks include the chairmanship of the European Council, the preparation of meetings, the facilitation of cohesion and consensus within the European Council and the external representation of the EU without prejudice to the powers of the EU High Representative of Foreign Affairs and Security Policy.

4/17 The so-called High Representative of the EU (HR) also participates at the meetings of the European Council which must take place at least twice every six months, but is, however, not a member of the European Council. For further details regarding the office of the HR see no. 4/28, below.

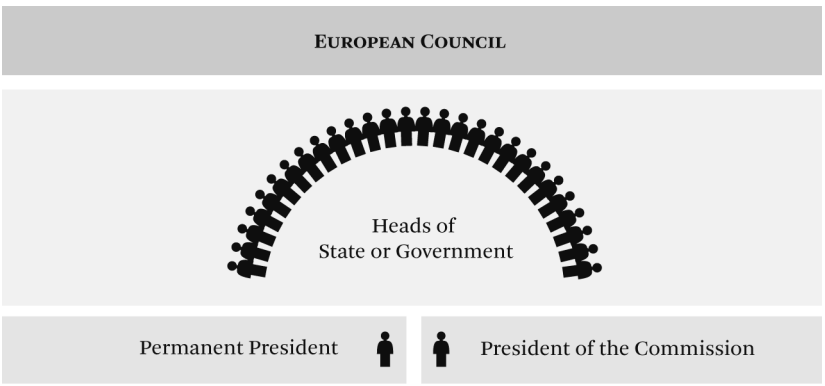

Figure 18: European Council.

The European Council must be distinguished from the Council of the EU which will be described in no. 4/18 et seq., below and the Council of Europe which is an international organisation mentioned in no. 1/15, above, and entirely independent from the EU.

B. The Council

4/18 The Council of the EU, the role of which is set forth in art. 16 TEU and artt. 237 et seq. TFEU, is the decisive legislative organ of the EU and simultaneously possesses executive competencies.

»The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.« (art. 16 para. 1 TEU)

4/19 It consists of representatives of the Member States on a ministerial level (generally, one minister per Member State) who are authorised to act for the Member States' governments. Accordingly, the Council, unlike the European Council, which also consists of the President of the Commission and the permanent President, is a body exclusively composed of representatives sent by the Member States. Thus, the Council consists of 28 members at present. It is an organ concerned with the protection of Member States' interests.

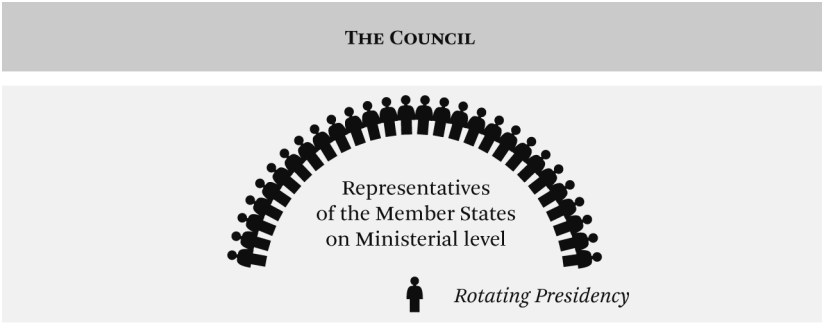

Figure 19: The Council.

Even though the Council is a unitary organ, it does not always act in the same composition. In respect of general and foreign affairs matters, the Council is composed of the foreign ministers, whereas in other specific fields of, for instance, the economy and finance, justice and internal affairs, development, agriculture, budget, employment and social affairs, transport and fisheries, each Member State dispatches its relevant competent minister to the Council. **4/20**

Contrary to the European Council, which is presided over by a permanent President, the presidency of the Council is held consecutively by the Member States for a period of six months at a time. **4/21**

According to art. 16 TEU, the Council, unless otherwise provided for, makes its decisions on the basis of a qualified majority of its members. In some cases, however, the Council decides with simple majority or, for instance, in matters of common security and defence policy, unanimously. If a qualified majority decision is necessary, the votes of the Council members are »weighed« according to a specified ratio. **4/22**

Given that the definition of a »qualified majority« was a highly contentious issue during the negotiations of the Treaty of Lisbon, the Member States agreed on three phases. Up until 31 October 2014 the »old« definition was applied in terms of which Germany, France, Italy and Great Britain had 29 votes each; Spain and Poland 27 votes each; Rumania 14; the Netherlands 13; Belgium, Czech Republic, Greece, Hungary and Portugal 12 votes each; Austria, Sweden and Bulgaria have 10 votes each; Denmark, Ireland, Lithuania, Slovakia and Finland have 7 votes each; Cyprus, Estonia, Latvia, Luxembourg and Slovenia had 4 votes each and Malta, being the smallest Member State, had 3 votes. This amounts to 345 votes in total. Decisions based on a qualified majority usually required 255 votes of 345 votes in total as well as the consent of the majority (in some cases two-thirds) of the Member States and the representation of at least 62 % of the EU population.

Since 1 November 2014, significant changes occured regarding the calculation of the qualified majority and a new blocking minority provision is introduced. Decisions made by the council have to be taken by 55 % of the Member States representing at least 65 % of the EU's population (cf. art. 16 para. 4 TEU). Up until 1 April 2017, however, every Member State may demand the application of the »old« procedure. From 2017 onwards, only the new procedure will be applied without exceptions.

4/23 Arguably, the Council is the significant legislative organ in the EU. However, the legislative activities of the Council are not carried out entirely independently of the other EU organs. Instead, they are closely linked with the Commission and the European Parliament (EP). For instance, the Council can only become active as a legislator on the proposal of the Commission. Nevertheless, it can require the Commission to prepare appropriate proposals. The forms of participation of the EP in the creation of and decision to adopt a legislative act range from a (rare) hearing to the (usual) co-decision as with the Lisbon Treaty the co-decision procedure became the standard legislative procedure. Within the scope of application of the ordinary legislative procedure, no legal act can be established against the will of the EP thus strengthening the democratic aspect of the EU legislative process. The form of participation required is stipulated by the relevant provision concerning the respective competence on which the legislative act is based. The central provision of competence, art. 114 TFEU for the establishment and functioning of the internal market, for example, provides for the resolution of directives and regulations (»measures«) by means of the ordinary legislative procedure in accordance with art. 294 TFEU thus pre-empting the co-decision procedure.

The most important legal acts of EU Secondary Law are, according to art. 288 TFEU, the regulation and the directive. These are enacted by the Council with the participation and co-decision of the EP. The regulation is binding in all its parts and has direct effect in the Member States, that is, no act of implementation is required.

A directive is only binding in respect of its targeted and defined aims. It leaves the details of the implementation of these aims to the Member States including the form and means of implementation. Unlike a regulation, a directive is never addressed at the citizens of the Member States themselves and does not directly establish citizens' rights and duties. Rather, it addresses only the Member States which must in turn create these rights and duties by means of an act of implementation in order to achieve the aims of the directive. Thus, a directive is usually not accorded direct effect in the Member States; only the measures of implementation taken by the Member States are directly effective. As will be explained more closely in no. 4/60 et seq., below, the non-implementation of a directive by a Member State may, however, result in Member State liability in favour of the aggrieved citizens and the so-called »vertical direct effect« of directives. Furthermore, the practice of legislating

by means of issuing directives has revealed that the text of the directives regulates the »aims« to be achieved by it in such a detailed manner that there is little difference between the texts of directives and regulations. Accordingly, in reality, Member States are left with little discretion regarding the choice of the form and means for implementation.

C. The Commission

4/24 The European Commission is essentially an executive organ which, additionally, has limited legislative competences at its disposal. As it has a de-facto monopoly of legislative initiative and controls compliance of Member States and other EU organs with EU law, the Commission is often referred to as the motor of the EU and the guardian of the Treaties. To counterbalance the Council, which protects the interests of the Member States, the Commission's task is to protect the interests of the EU. With respect to its position in the EU, its role in common foreign and security policy is less distinctive, but the uniform institutional framework of the EU is underlined by its full participation in intergovernmental fields of activity. According to art. 17 para. 1, 2 TEU

»The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.

Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.«

4/25 The Commission consists of 28 members who are elected on the basis of their general competency (as well as political background) and

must fully guarantee their independence from their respective Member States. The members of the Commission must be citizens of the Member States. The commission's current president is Jean-Claude Juncker.

According to art. 17 para. 5 TEU, since 2014 the Commission should consist of a number of members equivalent to two thirds of the number of Member States of the EU with a view to improving its efficiency and its capacity to act. A system of strictly equal rotation between the Member States should have been established by the Council. However, the European Council is competent to alter this number by unanimous decision. At its June 2009 meeting in Brussels, the European Council notified its intention to take a decision so to ensure that the Commission will continue to be represented by one national from every Member State.

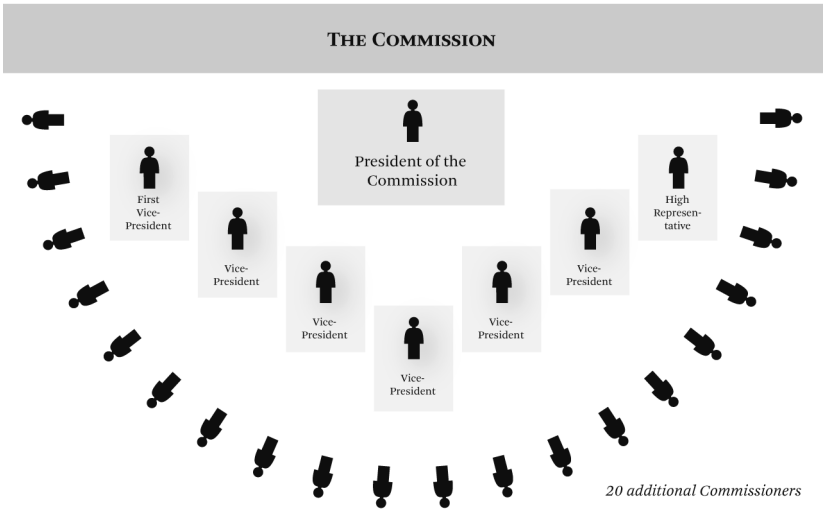

Figure 20: The Commission.

4/26 The appointment of Commission members is effected by the Member States' governments by mutual agreement. Such appointment is preceded by a multiphase-procedure according to art. 17 para. 7 TEU. The European Council nominates, via qualified majority, a suitable candidate for the Commission presidency who must subsequently be elected by a majority of the EP's members. If the majority does not elect the

proposed candidate, the European Council must make a further proposal. The Council thereafter proposes, with the approval of the designated President and on the basis of the suggestions made by the Member States, a list of candidates for the other members of the Commission. The President, the High Representative – being the Vice-president of the Commission – and the college of Commissioners are then subject to a vote of consent by the EP. The outcome of this process is the appointment of the Commission by the European Council.

4/27 The term of office of the Commission members is five years; a re-appointment is permissible. A demission of individual members of the Commission is only considered in cases of severe misconduct or incompetence. As a college, the Commission can be toppled by a motion of no-confidence in the EP.

4/28 The Treaty of Lisbon accorded the High Representative of the EU for Foreign Affairs and Security Policy (HR) a special role within the institutional framework of the EU. In addition to representing the EU in international relations and serving as President of the Foreign Affairs Council, he or she is also the first vice-president of the Commission and in charge of foreign affairs. Given his or her tasks within the Council and the Commission, the HR essentially wears two hats. Federica Mogherini currently holds the office.

4/29 An administrative organisation of more than 20.000 employees is directly responsible to the Commission. In this respect, so-called Directorates-General (DGs) and Services are of particular importance, allocated to oversee differing specific fields of activity. For example, one DG is responsible for foreign affairs, another for competition, another for agriculture, etc.

4/30 The limited legislative competence of the Commission is only of importance with respect to the ECSC (see no. 1/14 and 1/21, above). In the EU, the Commission participates in the legislative process with its rights of legislative initiative. The Commission's role of motor in the EU legislative process now relates to its participation in legislative acts of the Council and the EP. With the Commission's monopoly of legislative initiative, the Council can only enact legislative measures on proposal of the Commission. As a result, the Commission can control, within the scope of EU competences as well as the competences allocated to it, the fields and manner in which EU legislation is enacted.

4/31 Within the scope of the EU Treaty, the Commission possesses a derivative legislative competence to enact delegated and implementing

acts, including directives and regulations when, for instance, it has been authorised by a legislative act of the Council passed in accordance with the latter's competences assigned to it by the TFEU. The enactment of executive provisions by the Commission includes a wide scope of measures, ranging from authentic legal acts to the technical adaptation or amendment of legal acts of the Council and purely administrative measures.

4/32 Executive competences, namely decisions in individual cases on the basis of legal acts by the Council, are assigned to the Commission especially in the fields of anti-trust law (artt. 101 et seq. TFEU), competition policy and agriculture. The Commission is authorised, for instance on the basis of regulations of the Council, in accordance with art. 103 TFEU, to take action against agreements between and mergers of enterprises which are contrary to EU anti-trust law, and, in particular, to impose fines and penalties against those involved. For this reason, the Commission is the principal executive organ of the EU anti-trust law contained in artt. 101 et seq. TFEU and is also, in part due to its derivative legislative competence, empowered to enact regulations itself in this field of law.

4/33 The supervision of compliance with EU primary and secondary law vis-à-vis other EU organs – especially vis-à-vis the Council – and the Member States is also incumbent on the Commission. The Commission can institute proceedings before the CJEU against the relevant EU organs or Member States. Within the scope of above-mentioned anti-trust law, the controlling role of the Commission is extended to natural and legal persons subject to EU law; in this regard, the Commission is empowered to impose coercive measures.

4/34 Further provisions and tasks of the Commission include the preparation and execution of the budget, the representation of the EU in Member States as well as external representation of the EU, with the exception of matters concerning the Common Foreign and Security Policy which fall to the HR.

D. The European Parliament (EP)

4/35 The European Parliament executes consulting and supervisory rights together with competences concerning the legislative process which extend to co-decision following the Treaty of Lisbon (co-decision has

become the ordinary legislative procedure). In the context of the Common Foreign and Security Policy, the EP has certain consulting and controlling powers. According to art. 14 para. 1 TEU

> »The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.«

In the EU, the Commission – as counsellor for EU interests – and the Council – as forum for the Member States' interests – stand vis-à-vis the directly elected EP with the latter being composed of representatives of the EU's citizens. As indicated, the EP is thus neither a national Member State parliament nor a democratic body on the level of Member State co-operation but, rather, a forum for the representatives of all European citizens. It thus complements the democratic feedback provided by the members of government acting in the Council who are accountable to their national parliament; it does so by means of its direct democratic legitimisation, the latter being supported by a democratic election. Despite major breakthroughs regarding the legislative competences of the EP, the EU arguably still suffers from a democratic deficit; the aim is to gradually address this via future amendment of the Treaties. **4/36**

According to art. 14 para. 2 TEU, the number of members of the European Parliament may not exceed 750 delegates, plus the President of the EP, so 751 members in total. Contrary to the distribution of seats among the Member States prior to the Lisbon Treaty, which was assessed with the help of a code favouring small and medium-sized Member States, a fixed number of delegates per country is no longer stipulated by the Treaties. Instead, art. 14 TEU only determines the minimum number of six delegates per Member State and that no Member State may be allocated more than 96 seats. The precise composition of the EP is determined by the European Council in a unanimous decision with the consent of the EP. **4/37**

All EU citizens who are over the age of 18 years are eligible voters and can vote in the Member States where they reside. No EU-wide uniform electoral procedure exists. The delegates are elected for a period of five years. **4/38**

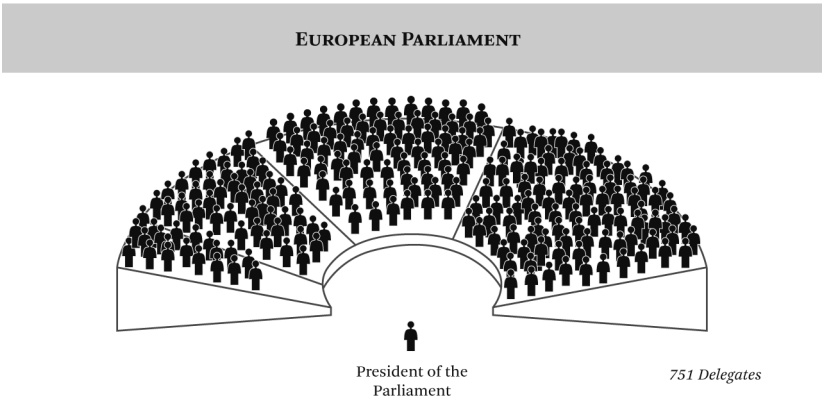

Figure 21: European Parliament.

4/39 Even though the European Parliament is not a completely independent legislative organ, its principal task is participation in the EU legislation procedure. Although the monopoly of legislative initiative in the EU is granted to the Commission, the EP, similar to the Council, has an indirect right to take legislative initiative by requesting, with the majority of its members, that the Commission presents proposals (art. 225 TFEU). The manner in which the EP participates in the actual legislative process of the EU depends on the specific competence granted to it by the Treaties – the general rule being that it may participate by co-decision in the ordinary legislative procedure. There are only a few cases of special legislative procedures which are detailed in the respective Treaty provisions concerning the adoption of legal acts. In addition, there are non-legislative procedures which are used for the adoption of acts in Common Foreign and Security Policy or for the adoption of non-binding instruments.

4/40 A second important role of the EP within the scope of the EU is controlling and participation in appointments. The appointment of the Commission members requires the consent of the Parliament (see no. 4/26, above). The strongest controlling instrument of the EP is the motion of no-confidence against the Commission. The European Parliament controls the Commission also by accepting the Commission's budget proposals.

4/41 The duty of the Commission to supply answers to questions referred by the EP, orally or in writing, is also of great practical significance. Whilst a formal right of interpellation vis-à-vis the Council does

not exist, in practice such an interpellation procedure is exercised with the consent of the Council. The EP is empowered to receive reports from the Council and the Commission as well as the European Council. The EP can institute legal proceedings against the Council and the Commission on the basis of infringements of EU law and deploy a commission of inquiry.

4/42 Every EU citizen or resident has the right to address a written request to the EP regarding matters falling in the EU's field of activity (art. 227 TFEU). The EP appoints a public advocate in accordance with art. 228 TFEU who accepts complaints made by EU citizens or persons resident in the EU.

4/43 Further tasks and roles of the EP include its participation in the establishment of the budget and in its competences within the context of external relations of the EU to third countries or international organisations.

E. The Court of Justice of the European Union (CJEU)

4/44 The task of the CJEU, as stated in art. 19 para. 1 TEU, is to ensure uniform interpretation and application of primary and secondary EU law. However, due to its intergovernmental character, the Court's jurisdiction excludes the area of Common Foreign and Security Policy, except for two exceptions in art. 24 TEU.

4/45 The important position of the CJEU in the institutional system of the EU is linked with the latter's characteristic of being a legal community. The EU, on the one hand, has direct impact on the Member States through its issuing of legislation with direct effect but, on the other hand, also depends on the Member States to ensure compliance with the law as it does not possess instruments of enforcement comparable to those of the sovereign coercive powers of nations. Essentially, it is the role of the other EU organs, or, as the case may be, the Member States, to apply EU law subject to independent judicial control by the CJEU.

4/46 The Courts of Justice of the EU include the Court of Justice, the General Court (GC) and specialised courts. The Court of Justice is composed of 28 judges – one judge for each Member State – and is supported by nine Advocate-Generals (AG). The judges are appointed by the governments of the Member States in mutual agreement for a

period of six years. All 28 judges of the Court of Justice are involved in making judicial decisions. However, the Court of Justice does not always hold plenary sessions, but can also form chambers of three, five, or 13 judges, which then conduct specific tasks or determine certain categories of litigation. The Court of Justice, however, must hold a plenary session when a Member State or an EU organ party to the proceedings so requests.

4/47 In order to relieve the case load of the Court of Justice, especially in respect of litigation in which complex circumstances are to be resolved, a General Court (GC) was assigned to the CJEU; the Court of Justice acts as a court of appeal in legal decisions taken by the GC. The competence of the GC particularly includes the actions of individuals in personnel matters of the EU – notably employment relationships of EU officials – as well as the actions of individuals against the Commission's decisions in the field of anti-trust law. The GC is composed of at least one judge per Member State.

4/48 The Court of Justice, unlike the GC, is predominantly competent to hear claims or actions of Member States or EU organs. Actions can also be brought by Member States or EU organs in cases of violations of primary and secondary EU law by a Member State, for example, where a Member State does not implement a directive in time or acts contrary to the principle of loyalty in art. 4 para. 3 TEU; in cases of the nullity of an act of an EU organ for reasons of incompetence or Treaty violation; or in cases of omission of an EU organ where there is a duty to act.

4/49 The most significant role of the CJEU is the so-called preliminary reference procedure. According to art. 267 TFEU, the CJEU is authorised to interpret all EU primary and secondary law. If a court of a Member State is in doubt about the interpretation of a provision of EU law in a pending matter, it can approach the CJEU for a binding interpretation. Member State courts acting as courts of final instance in particular proceedings have the duty to submit such questions of interpretation to the CJEU. The CJEU renders its decision on the interpretation in the form of a so-called »preliminary ruling«. Through this, the interpretation of the relevant EU law provision becomes binding on all Member States and thus also the court that submitted the question. The latter has to use the interpretation of the CJEU as a basis for its decision in the pending procedure. The CJEU has no influence on the decision of the case, however; it merely answers the legal question of the interpretation of a particular European legal provision.

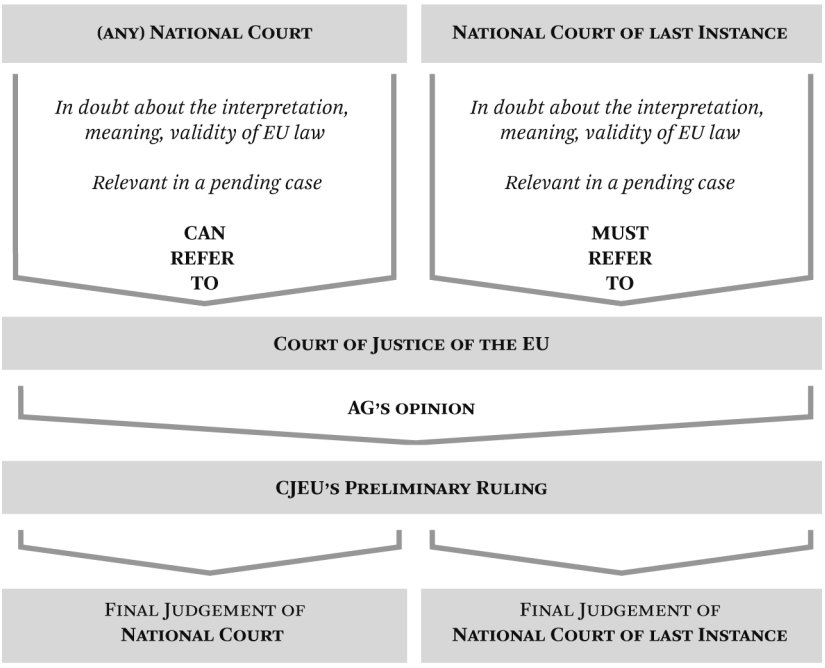

Figure 22: Preliminary reference procedure.

The activities of the CJEU within the scope of the preliminary procedure guarantee uniform interpretation and application of EU law. Without this, EU law would be threatened by fragmentation via the many differing interpretations of Member State courts. Indeed, the Member States' interpretation would result in the type of divergencies studied earlier in the context of the interpretation of international treaties (see no. 1/71 et seq., above). **4/50**

As you will notice in the following chapters on EU law, the case-law of the CJEU plays a substantial role. Although EU law is not a »common law« system in which case-law operates as a dominant legal source (see no. 2/82, above) and, in principle, while the CJEU was not intended to create law but rather to apply and interpret it, the Court frequently employs preliminary decisions as a means of developing and expanding EU law beyond the original intention of the European legislator. This development has three distinctive rationales. First, the primary law, central to the European legal system, is formulated somewhat vaguely. Thus, the direct application by Member States gives rise to a plethora **4/51**

of questions of interpretation. The CJEU can step in here. Second, the CJEU's decisions on interpretation are binding on Member States and the EU organs. They thus serve as precedents for subsequent cases and leave little room for interpretations differing from that of the CJEU. Third, the CJEU's judges are aware of their potential for legal development and have not hesitated to avail themselves of the opportunities to engage in doing so.

F. The European Court of Auditors

4/52 The European Court of Auditors audits the European budgets verifying the lawfulness of all income and expenditure of the EU and its organs, as well as its facilities (art. 287 TFEU). Particularly, it assesses the efficiency of budgetary management and reports all irregularities. Its statement is presented to the Council and the EP and published in the Official Journal of the EU. Additionally, at the end of each budgetary year, it is required to present its budgetary report to the EU organs and publish it in the Official Journal.

G. The European Central Bank (ECB)

4/53 Since December 2009, the European Central Bank is listed among the organs of the EU. It also has legal personality under public international law. Since 1999, the ECB, together with the Member States that adopted the Euro, has been responsible for conducting the monetary policy for the Euro region. It is an independent institution of the EU whose organs may not take orders from national governments, EU organs or other organisations. Together with the national central banks, the ECB forms the so-called European System of Central Banks (ESCB) whose principal task is the maintenance of price stability (art. 282 TFEU).

III. Supremacy and direct effect of EU law in the Member States

In this chapter, we will examine three important yet difficult principles. First, the supremacy of EU law; second, the direct effect of EU law in the Member States both in respect of primary and secondary EU law and; third, in the context of directives, the so-called »Member State liability« (created by the CJEU) arising where a directive has not been fulfilled by the Member State or some other primary EU law or regulation has been infringed. 4/54

All three principles – supremacy, direct effect and Member State liability – are illustrated and discussed by means of the CJEU's decisions which developed or at least affirmed the principles' very existence. Please read the full decisions and do not rely on our synopsis here.

A. Supremacy of EU Law

CJEU 18.7.1964, C-6/53, Costa v. ENEL, ECLI:EU:C:1964:66.

By means of law no. 1643 of 6 December 1962, the Italian Republic nationalised the production and distribution of electricity and ENEL, a legal entity, was established. In a legal action pending with a Milanese court involving an electricity bill between ENEL and a lawyer Flaminio Costa, the latter appearing as both a consumer of electricity as well as a shareholder in the public limited company, Edisonvolta, which was affected by nationalisation, requested that the CJEU apply art. 177 TEC (now: art. 267 TFEU) and interpret artt. 102 (now: 117), 93 (now: 108), 53 (repealed) and 37 TEC (now: 37 TFEU). These articles were, according to Mr. Costa, infringed by the nationalisation law. The Milanese court submitted the question of interpretation posed by Mr. Costa to the CJEU which declared the questions of interpretation impermissible with reference to art. 177 TEC (now: art. 267 TFEU). Thus, the CJEU made a decision within the context of the preliminary reference procedure.

The decision defines the relationship between EU law and the national law of Member States. Primary and secondary EU law form an autono- 4/55

mous legal order enjoying supremacy of application over national law enacted later in time.

For instance, the principle »lex posterior derogat legi priori«, hence, does not apply to the relationship between national and EU law. Even though the European legal order was established in accordance with public international law between the Member States on the basis of mutual agreement, an autonomous legal order has developed out of it. The rights and duties emanating from this legal order can thus not be prejudiced by national measures of Member States subsequently enacted.

Which important clarifications does the CJEU initially make about the nature and functionality of the preliminary reference procedure governed by art. 267 TFEU?

How does the CJEU justify the principle of the supremacy of EU law established in its decision?

Which parts of EU law (primary law, secondary law) enjoy supremacy over conflicting national law according to the decision in ENEL? Does the Italian nationalisation law infringe EU law?

Which task lies ahead for the Commission (following the CJEU judgment) in a case where a Member State subsequently enacts laws which are contrary to EU law?

Which possibilities does an individual suffering from infringement of EU law have according to the judgment in ENEL?

B. Direct effect of EU law

CJEU, 5.2.1963, C-26/92, van Gend & Loos v. Netherlands, ECLI:EU:C:1963:1.

In September 1960, the company Van Gend & Loos imported a specified quantity of urea-formaldehyde into the Netherlands from Germany. Dutch Customs and Excise charged them an ad valorem duty of 8 %. This amounted to application of a »Tariefbesluit« which had come into force in March 1960. According to the prior »Tariefbesluit« of 1947, which was in force at the time the EEC Treaty (now: TFEU) came into operation in the Netherlands in 1958, a tariff of only 3 % was levied on

the importation of this substance into the Netherlands. The company Van Gend & Loos brought an action challenging the ad valorem duty of 8 % before the Tariefcommissie in Amsterdam, arguing that the increased ad valorem duty – as a result of the Tariefbesluit 1960 – represented an infringement of the former art. 12 TEC (now: art. 30 TFEU). Article 12 TEC, unlike the current art. 30 TFEU, did not prohibit all levying of customs duties on imports between Member States but codified the level of customs duties as they existed at the time that the EEC Treaty came into force. Accordingly, levying new customs duties and increasing old tariff rates between Member States was prohibited according to art. 12 TEC.

The Dutch Tariefcommissie submitted the question of how to interpret art. 12 TEC to the CJEU in accordance with art. 177 TEC (now: art. 267 TFEU). In the context of a preliminary reference procedure the CJEU arrived at the decision outlined below.

4/56 The judgment of the CJEU established the principle of direct effect of EU law by interpreting art. 12 TEC (now: art. 30 TEU) as a prohibition on new customs duties on goods between Member States. »Direct effect« means that the provisions of EU law, which establish rights and duties for private persons, do not have to be adopted by Member States into their domestic law in order for the rights and duties established by them to be directly applicable vis-à-vis individuals. The individual can directly invoke the rights established in the Treaties and can demand that national authorities and courts apply them directly. Accordingly, the authorities in the above case had to refrain from applying their national law, namely Tariefbesluit 1960, as it was contrary to the corresponding EU law.

4/57 According to the CJEU, the predominant reason for this direct application of EU law is the quality of the European legal order. However, the CJEU did not make use of the argument of the »autonomous« character of this »new legal order« here, as it did in the later case of CJEU 18.7.1964, C-6/53, Costa v. ENEL, ECLI:EU:C:1964:66 (see no. 4/55, above) but argued that such direct application arises from the perspective of public international law in relation to the limitation of Member States' sovereignty by the conclusion of the Treaties. As all Member States agreed to limit their sovereignty with regard to market matters, such limitation must also apply to the individuals involved.

4/58 The direct effect was necessary to realise the goals of the EEC treaty (now: TFEU), especially with regard to the creation of a common mar-

ket. Without direct effect in national law, the provisions in this regard would be ineffective unless proceedings were brought against Member States for violation of provisions of the Treaty. A pivotal aspect of the CJEU's interpretative decision was that the ability of individuals to rely directly on rights established by the Treaty strengthens the integration of the common market. This effect is often dubbed as the »effet utile« interpretation of EU law. This teleological interpretation method usually describes the CJEU's technique to interpret the European legal provisions in a manner that advances the aims of the TFEU to the greatest possible extent.

4/59 Of course, not every provision of primary and secondary law is suited to direct application. According to the case-law of the CJEU, the requirements for the direct application of EU law provisions are as follows. First, the provision must grant an unconditional, precisely formulated right to the individual. Second, the provision must not grant a sphere of discretion to the Member States. Third, the provision must not necessitate any further implementation measures by a Member State.

Pierre Pescatore (1919–2010), a former CJEU judge, commented on the decision in Van Gend en Loos, as well as the principle of the direct effect of EU law created by the CJEU, as follows:

»It appears from these considerations that in the opinion of the Court, the Treaty has created a Community not only of states but also of peoples and persons and that therefore not only Member States but also individuals must be visualised as being subjects of Community law. This is the consequence of a democratic ideal, meaning that in the Community, as well as in a modern constitutional state, Governments may not say any more what they are used to doing in international law: L'Etat, c'est moi. Far from it: the Community calls for participation of everybody, with the result that private individuals are not only liable to burdens and obligations, but that they have also prerogatives and rights which must be legally protected. It was thus a highly political idea, drawn from a perception of the constitutional system of the Community, which is at the basis of Van Gend en Loos and which continues to inspire the whole doctrine flowing from it.«

Pescatore, The Doctrine of »Direct Effect«: An Infant Disease of Community Law, European Law Review (1983) 155, 158.

? Which provision of EU law did the CJEU interpret in Van Gend en Loos? To what extent can a right for an individual market participant be inter-

preted from this provision? How and where can the market participant enforce this right?

What arguments exist against the direct effect of EU law?

How does the CJEU argue that the provisions of the TFEU must have direct effect? To what extent do the CJEU's arguments differ with regard to the above decision in CJEU 18.7.1964, C-6/53, Costa v. ENEL, ECLI:EU:C:1964:66?

What is »effet-utile-interpretation«?

Which are the features necessary for a specific provision of EU law to have direct effect in the national jurisdictions of the Member States? Which provisions of the TFEU would not fulfil these criteria? Could these criteria also be fulfilled by regulations or directives?

According to Pescatore's view, EU law has become more democratic via the principle of direct effect. Do you agree?

C. Member State liability

CJEU, 19.11.1991, joined cases C-6/90 and C-9/90, Francovich v. Italy, ECLI:EU:C:1991:428.

The Italian government was obliged to implement the EU Directive 80/987 concerning the minimum protection of employees in the event of the insolvency of their employer by 23 October 1983. According to this Directive, Member States had to ensure that the claims of employees to remuneration payments could also be satisfied after the insolvency of the employer. The Member States could elect their own systems of employee protection scheme to this end. Italy did not implement the Directive in time and was convicted by the CJEU in 1989 in a Treaty violation proceeding.

Andrea Francovich, the Italian claimant in the proceeding C-6/90, had worked for a company in Vicenza but had only received fractional advance salary payments. He successfully brought legal proceedings against the company; he succeeded and the company was ordered to pay 6 million Italian Lira, but the compulsory execution was without success as the company was insolvent. Francovich brought a subsequent action before the Pretura di Vicenza against the Italian state for the establishment of one of the guarantees for his salary named in the Directive, or, alternatively, for compensation of the damage suffered

by him. The Pretura di Vicenza referred the following question on the interpretation of art. 189 para. 3 TEC (now: art. 288 TFEU) to the CJEU: Can an individual successfully bring an action for compensation of damage suffered due to non-implementation of a directive against a Member State? The CJEU decided this question in the context of the preliminary reference procedure of art. 177 TEC (now: art. 267 TFEU).

4/60 In the Francovich decision, the CJEU established that a Member State could not rely on non-implementation of a directive.

Ensuing from later decisions, a private individual, on whom duties are imposed vis-à-vis other individuals by a directive, can rely on the non-implementation of the directive by the Member State as a defence for non-compliance with his or her duties. He or she can rely on the national legal position which, in such a case, supports the fact that he or she has no effective duty arising from the Member State's non-implementation of the directive.

4/61 In the case of Francovich, the duty to implement the Directive was to be discharged by the Member State, via the establishment of means guaranteeing remuneration payments after insolvency, and not by a private individual. In this regard, a directive which confers unconditional and precise rights upon individuals has direct effect against the Member State. The decision thus established vertical direct effect as between private persons and the Member State and rejected a horizontal direct effect between private persons.

4/62 In the present case, the rights of the employee were unconditional and precisely defined by the Directive. However, as the Directive granted a degree of discretion to the Member State concerning the means by which employee protection was to be achieved, the right of the individual employee was unsuitable for a direct claim against the Member State (see no. 4/59, above). Nevertheless, the CJEU elaborated that the fundamental vertical direct effect of a directive against a Member State results in liability for damage, caused by non-implementation of a directive in breach of the Member States' duty to implement it.

4/63 As a result, an individual is entitled to compensation for damage enforceable against a Member State when rights supposedly granted by the directive cannot be enforced due to the non-implementation

of this directive by the said Member State. The CJEU mapped out four distinct requirements for such a claim. First, the directive must intend to grant rights to individuals. Second, these rights must be precisely definable with regard to their content and extent. Third, there must be a causal relationship between the non-implementation by a Member State in breach of its duty to implement the directive and the damage suffered by the individual. Third, the infringement of EU law by a Member State must represent a »qualified breach«, in other words, the infringement must be clearly evident as opposed to arising only after the assessment of contentious and arguable questions of interpretation.

4/64 In this judgment the CJEU again refers to the »effet utile« interpretation (see no. 4/58, above) when rendering Member States liable for their omission to implement EU law. In addition, it was noted that the direct effect or direct application of EU law in all its differing forms of implementation was also based on Member States' loyalty duties based on art. 4 para. 3 TEU (see no. 4/14, above).

4/65 In later decisions, the CJEU argued that Member State liability would not only arise as a result of the non-implementation of directives by Member States, but also as a result of any other infringement of an EU legal provision by a Member State. As a result, Member States' liability may also arise due to violations of provisions of EU primary and secondary law.

What is to be understood by the »vertical direct effect« of a directive? Which two forms of implementation could such vertical direct effect have?

Why could Francovich not successfully sue the Italian state for its failure to fulfil its duty imposed by the Directive, but »merely« for compensation of the damage suffered? Is the right of the individual provided for by the Directive sufficiently precise and unconditional?

?

How did the CJEU justify the establishment of Member State liability in the Francovich case? At which point does the CJEU refer to the so-called »effet-utile« of EU law?

Which prerequisites must be fulfilled for the establishment of a claim by an individual against a Member State following the decision in Francovich?

IV. The fundamental freedoms of the EU

4/66 In the following we discuss the so-called four fundamental freedoms of the EU, as well as the subtle unification of private law systems, which have been effected by a multitude of directives with reference to illustratrative CJEU decisions – »Reinheitsgebot«, »GB-INNO« and »Verein für Konsumenteninformation« which are included as a digest within the chapter.

A. The four fundamental freedoms of the TFEU

4/67 The four fundamental freedoms of the EU are at the very core of the realisation of the customs union, which is usually referred to as the »internal market«. They are designed to guarantee free movement of economic services and market participants across the national European borders. They are the free movement of:

- Goods (artt. 34, 35 TFEU as well as art. 28, 30 TFEU, art. 110 TFEU),
- Workers (art. 45 TFEU including self-employed entrepreneurs related to the freedom of establishment in art. 49 TFEU – in this respect, the so-called free movement of persons),
- Services (art. 56 TFEU), and
- Capital (art. 63 TFEU).

4/68 The free movement of goods facilitates the sale of goods across national borders within the internal market, for instance, the import of goods from other Member States, the export of goods to other Member States, and the sale of goods to persons domiciled in other Member States. These activities may not be impeded by national laws or measures of the various Member States.

4/69 Regarding the freedom to provide services, the same applies to the rendering of services across the national borders within the internal market. For example, the free movement of a service provider who moves from one Member State to another to render a service to local clients is guaranteed. Likewise, the freedom extends to the local provider of services to clients who come to the provider's Member State from another Member State as well as the provision of services by e-mail, telephone, internet, etc. by a provider from another Member State to local clients.

In the context of the free movement of persons, EU citizens establishing an enterprise or who are employed on a continuing basis in another Member State are protected. Their ability to establish a business in another Member State or be employed in such state may be impeded by national measures of this state. **4/70**

The free movement of capital protects monetary and capital transactions effected by natural or legal persons between Member States (and to a limited extent also between EU Member States and third countries). **4/71**

For example, if an Austrian citizen intends to invest his capital in France, he or she must not be restricted in doing so to a greater extent than a French national would be.

B. Common features

The fundamental freedoms prohibit national market regulation by Member States. Accordingly, they are first and foremost vertically oriented and directed at Member States. However, in some exceptional cases, the CJEU has determined that they have horizontal effect in the context of directly restricting private individuals' conduct. **4/72**

The fundamental freedoms have a deregulatory effect. They do not create any rules but have supremacy over the legal rules of the Member States which may impede the fundamental freedoms. They are also regulatory in the sense that they establish new uniform or harmonised rules for the market. Both instruments, the deregulatory control of the fundamental freedoms and the regulatory effect of EU legislation, are intended to create an internal market; both the elimination of market impediments by national measures through the control of fundamental freedoms as well as the EU-wide approximation of market conditions via regulations and directives contribute to the establishment of a market without frontiers or transport impediments. **4/73**

In the process of controlling national rules of Member States in light of the fundamental freedoms, the CJEU makes no differentiation between national rules of private or public law. It assesses both equally with a view to assessing the discriminatory or impeding effects that such a rule might have on the internal market. **4/74**

4/75 All of the fundamental freedoms prohibit national rules that discriminate against citizens from other Member States in relation to the Member State's citizens. Additionally, the TFEU provides a general prohibition on discrimination by way of citizenship in art. 18. However, if a fundamental freedom has been infringed by a discriminatory national rule, in addition to a violation of art. 18 TFEU, the CJEU tends to apply the more specific provision on the fundamental freedom violated.

4/76 The CJEU has extended the scope of the individual fundamental freedoms, initially particularly the free movement of goods and subsequently also the other three freedoms, from a simple prohibition against discrimination to a prohibition of restrictions. In this way, national rules that do not discriminate against foreign nationals, foreign goods or foreign capital, yet nevertheless impede the free functioning of the internal market are prohibited.

A German legal provision demanding that only imported (foreign) beer, but not domestic beer, must be brewed in accordance with the »German Reinheitsgebot« – a medieval purity requirement – is discriminatory. If the German provision demanded instead that, irrespective of the origin of the beer, it must be brewed in accordance with the »German Reinheitsgebot«, this might not constitute discrimination that could possibly be regarded as a restrictive provision against imported beer from a foreign country (see no. 4/86, below).

4/77 The general requirement for the applicability of the fundamental freedoms is cross-border commerce. In other words, the fundamental freedoms are not applicable to a domestic entrepreneur constrained by domestic legal provisions in his or her domestic economic activities.

If a person from another Member State intends to offer his or her products or services in Austria or seeks to establish an enterprise or finds regular employment in Austria and feels constrained or discriminated against by a national legal provision, this represents a case for the control of the fundamental freedoms.

4/78 Not all national provisions of the receiving Member State which prove to be discriminatory or an impediment to the internal market are neces-

sarily a violation of one or more fundamental freedoms. Certain exceptions exist if the relevant provision pursues justified objectives in a proportionate manner. Generally, for the justification of a discriminatory provision, two factors are relevant. First, there must be relevant grounds of justification and, second, the provision must pass the test of proportionality.

4/79 As regards the grounds for justification, certain permissible discriminatory barriers concerning the free movement of goods are stipulated in art. 36 TFEU, for the free movement of workers in art. 45 para. 3 TFEU, for the freedom of establishment in art. 52 TFEU, for the freedom of services in art. 62 TFEU and, finally, for the free movement of capital in art. 65 TFEU. In the majority of cases, the justified discriminatory barriers contain reasons relating to public policy, the protection of the health and life of humans, and, additionally, in respect of the free movement of goods, the »protection of animals and plants, the protection of national cultural heritage of artistic, historical or archaeological value and of industrial or commercial property«. This exhaustive list of justified discriminatory barriers in turn justifies discriminatory domestic provisions thereby rendering them legally permissible.

4/80 Beside these barriers, certain »mandatory requirements« exist which cannot justify discrimination but only non-discriminatory constraints to the fundamental freedoms. The CJEU cites the following »mandatory requirements of public interest«: the fairness of commercial transactions, the good reputation of a specific sector – for example, the financial services sector –, the protection of consumers or customers of entrepreneurs, the maintenance of the diversity of the media, the protection of a functioning administration of justice and an effective fiscal control. Unlike the justified discriminatory barriers, the mandatory requirements are to be regarded as an open category subject to possible future expansion by the CJEU.

4/81 For a national provision restricting a fundamental freedom to be justified, however, it is not sufficient that it satisfies only one of the grounds of justification, namely either a discriminatory barrier or a mandatory requirement. The national provision must, additionally, pass the test of proportionality. It must be suitable for achieving the concerned protection goal; it has to be necessary in order to achieve this objective, and it must be proportionate in this respect. This means that it has to be a measure that interferes minimally with a fundamental

freedom and which is also necessary and proportionate in achieving the concerned objective.

4/82 Member States that violate one of the fundamental freedoms through their national laws can be subject to one of the following three outcomes. First, the Commission may commence Treaty violation proceedings according to artt. 258, 259 TFEU or, second, the affected private individual may refer to the direct applicability of the TFEU's fundamental freedoms. In both cases the concerned Member State and its courts are obliged to desist from applying the offending national law. In the latter case, all prerequisites for the direct applicability of the fundamental freedoms have to be fulfilled (see no. 4/59, above). Third, the private individual can refer to the (vertical) direct effect of the fundamental freedoms in the form of Member State liability (see no. 4/62, above).

4/83 In the case of a non-justifiable violation of a fundamental freedom by a Member State's law, the Member State is prohibited from applying the concerned national provision to the extent that it violates the fundamental freedom. This may seem trivial but in fact it is not, because fundamental freedoms are only violated in cross-frontier circumstances. Thus, according to EU law, the Member State is only free to continue applying the offending national rule to purely domestic circumstances.

German law prohibits the distribution of »beer« in Germany which is not brewed in accordance with the »German Reinheitsgebot«. This prohibition infringes the free movement of goods because the import of foreign »beer« not brewed in accordance with the »German Reinheitsgebot« is restricted. According to the interpretation of the CJEU, a justification for reasons of health or consumer protection is not applicable. Therefore, from the perspective of EU law, Germany is not allowed to apply its distribution prohibition to imported beer from other Member States and is free only to apply this rule to domestic breweries.

4/84 If Germany retains the application of »Reinheitsgebot« to domestic circumstances, it amounts to so-called »internal discrimination« which is not regarded as unlawful with respect to EU law. As a result, domestic brewers have to conform to stricter rules than foreign ones marketing their products on the same, namely the German, market. However,

such discriminatory treatment of Member State nationals and foreigners could contravene the relevant national constitutional law.

C. Illustrative case-law

To see how this system of freedoms, justification and sanctions relates to real-life scenarios we now examine three CJEU judgments in the related areas. **4/85**

CJEU 12.3.1987, C-178/84, Commission of the European Communities v. Federal Republic of Germany (»Reinheitsgebot für Bier«), ECLI:EU:C:1987:126.

According to the German »Reinheitsgebot« (purity rule), only barley, hops, yeast and water, and no other further additives, were permitted to be used in the production of beer. Beverages from other Member States which were not brewed in accordance with this »Reinheitsgebot« could not be distributed under the label »beer«. The Commission held this to be an infringement of art. 30 TEC (now: art. 34 TFEU) and made an application, by means of Treaty violation proceedings in accordance with art. 169 TEC (now: art. 258 TFEU), to the CJEU, requesting it to declare that Germany had infringed its contractual duties.

The CJEU, in a first step, affirmed the existence of a restriction (»measure having equivalent effect« in terms of art. 34 TFEU) of the free movement of goods based on the fact that the import of beer from other Member States was in fact impeded by the German provision. In a second step, the CJEU assessed whether any grounds for justification existed that have been used in a proportionate manner. Beer which is not brewed in accordance with the »German Reinheitsgebot«, is not per se damaging to health; accordingly, the protection of health as a justified discriminatory barrier in art. 36 TFEU could not be relied on. Alternatively, as the consumer may have an interest for reasons of personal preference in exclusively consuming beer which has been brewed in accordance with the »German Reinheitsgebot«, the justification of »consumer protection« might apply; the latter being a »mandatory requirement of public interest«. In different Member States, different consumer approaches and different standards of consumer protection exist, leading to the **4/86**

emergence of a gradient in the competitive protection level in the relationship between the Member States. The CJEU protects the responsible citizen and the sensible consumer. The CJEU, thus supports the so-called »doctrine of labelling« whereby consumer protection is achieved by adequate labelling. Member States are, therefore, not permitted to regulate the contents of products offered on the market, except for the purpose of preventing a direct health hazard, but must instead confine themselves to ensuring that all ingredients of a product are clearly visible to the consumer on the product's packaging. It is thus the consumer's responsibility to determine whether he or she wants to consume products containing certain ingredients. Even though some consumers may have an interest in exclusively consuming beer which has been brewed according to the »German Reinheitsgebot«, a complete prohibition of other beers is regarded as a disproportional measure as it is too restrictive. The same objective can also be achieved via less restrictive means such as adequately informative labelling.

CJEU 7.3.1990, C-362/88, GB-INNO-BM v. Confédération du commerce luxembourgeois, ECLI:EU:C:1990:102.

The Belgian public limited company GB-INNO operated a number of supermarkets in Belgium near the border to Luxembourg. The customers of these supermarkets included Belgian as well as Luxembourgian consumers, the latter having crossed the nearby border. GB-INNO decided to distribute leaflets in Belgium as well as in Luxembourg providing information about product discounts: in the leaflets, the older, higher prices were quoted, which no longer applied, and, additionally, the duration of the availability of product discounts was limited to a certain period of time. This type of advertising was permissible according to Belgian law, but not according to Luxembourgian law. The Luxembourgian Regulation concerning unfair competition prohibited the quoting of old prices, as well as the specification of the duration of the offer, when offering discounts. As a result, a Luxembourgian trade association obtained an interim injunction at a Luxembourgian court, prohibiting GB-INNO from distributing the leaflets. GB-INNO challenged this interim injunction at the Luxembourgian Cour de cassation. The latter submitted the question of the interpretation of the free movement of goods in the context of the preliminary reference procedure (art. 267 TFEU) to the CJEU in order to assess whether the Luxembourgian Regulation infringed on EU law's free movement of goods.

4/87 The decision of the CJEU illustrates, on the one hand, that the cross-border reference requirement is necessary for the freedom of free movement of goods to apply. This requirement is met not only when the vendor offers his or her products in a foreign Member State but also when the purchaser crosses the border and purchases the vendor's products at the vendor's place of domicile or registered office. Furthermore, the protection of the free movement of goods extends to acts preparatory to the purchase process, for example advertising of a product by means of leaflets.

4/88 On the other hand, the CJEU reinforced its model of the responsible and sensible consumer (see no. 4/86, above) in terms of which the consumer's interest in accurate information must be protected. In its decision, the CJEU refers to the centrality of »Right of Consumers to Information and Clarification« in EU law. Thus, the consumer model was of central importance to the CJEU's decision as to whether the justification of the interest of consumer protection in the Luxembourgian Regulation amounted to a »mandatory requirement of public interest«. The Luxembourgian legislators relied on the argument that they intended to protect consumers by withholding information about old prices and the duration of special offers – based on the apparent assumption of the inability of consumers to interpret this information correctly – but the CJEU rejected this, finding the Luxembourgian legislator's approach inappropriate and disproportional to the goal of achieving consumer protection. The Luxembourgian courts were thus not permitted to apply the Luxembourgian Regulation to cross-border product purchases.

4/89 Finally, the CJEU, in its judgment, established that the free movement of goods not only serves to protect cross-border vendors of products but also consumers who cross the border at their own initiative in order to purchase the products. The ambit of the fundamental freedom was shifted from its initial focus on the free movement of goods and, thus, the freedom of vendors to the freedom of purchasers. It is now possible that not only a vendor who is discriminated against might initiate proceedings but also a consumer suffering from the impediment of the free market.

A recent example illustrating this point concerns the question of whether medical products purchased in another Member State may be subsequently covered by the purchaser's domestic social insurance. It

was determined that such indemnification must be effectuated in the same way as domestic medical purchases.

Are EU fundamental freedoms legal provisions that have direct effect (in terms of horizontal and vertical direct effect) in the national legal systems of the Member States?

What legal consequences does the violation of a fundamental freedom by a Member State have? How can the aggrieved citizen defend himself or herself against such an infringement?

Which two steps have to be followed by a court when addressing the question of whether a national legal provision (of a Member State) violates a fundamental freedom (for example the free movement of goods)?

Why did the CJEU in the »Reinheitsgebot« decision hold that the German provision could not be justified on the grounds of the protection of health or the protection of consumers? Describe the CJEU's »consumer model«.

Was there a cross-border element in the circumstances of the GB-INNO case?

What is meant by the term »internal discrimination«? Is such discrimination permissible according to EU law?

V. The harmonisation of private law by means of directives and regulations

4/90 In the area of private law (see no. 1/37 et seq., above) a vast number of EU directives have been passed in the last decades. These directives have clearly altered the private law of all Member States. Numerous further directives in the area of contract and private law are in the pipeline.

Recapitulate the differences between EU directives and EU regulations, as well as the effectiveness of directives in no. 1/27, above.

As directives, unlike regulations, do not unify Member States' law we will not use the term »unification of law« but rather »approximation of laws« or »harmonisation of laws«.

There are certain clear benefits of the harmonisation of Member States' private law. First, similar legal positions in Member States in respect of the regulated issues facilitate the cross-border activity of market participants. Vendors, consumers and employees alike are not constrained in their economic activities in a foreign Member State by vast differences between the domestic legal position and that of the foreign Member State. Cross-border market activities are promoted by uniform legal positions in areas of the law proximal to the economy. **4/91**

Second, as many directives aim at uniform protection by means of a minimum standard in all Member States, the position of consumers in Member States with previously minimal consumer protection has improved. A considerable number of consumer protection provisions were introduced in these Member States by means of EU directives. This extends to other fields of private law, for instance to trade representatives, creditors of malicious debtors and bank customers where directives have advanced the domestic law in this sphere. **4/92**

Notwithstanding these achievements, we have to keep in mind some serious disadvantages of this approximation of laws. First, directives engage only very selectively in specific legal areas. All remaining legal matters in the broader context are left to the domestic legislator which results in grave inconsistencies between harmonised and non-harmonised law. With ongoing harmonisation these inconsistencies often spread to all spheres of private law. In other words, private law becomes increasingly fragmented and less systematic as a result of the »interference« of directives. This is worsened by the fact that the directives are not homogeneous in themselves in that those regulating similar issues often do not conform to one another and, at times, are even contradictory. **4/93**

At the same time the approximation of legal positions in the Member States achieved by the directives is only relative in nature. As the Member States are free to use whatever means they choose to achieve the aims set out by the directive and as most directives only set a minimum standard, some Member States establish stronger protective standards than provided in the directives. Due to this practice, it is very difficult for a market participant to ascertain the precise legal position in a foreign Member State. Information concerning the exact manner in which a directive has been implemented in a certain Member State is difficult to obtain. **4/94**

In order to counter these numerous objections to a further harmonisation the Commission, in 2005, initiated an EU-wide network of re- **4/95**

searchers to develop a »Common Frame of Reference« for all existing directives in the area of contract law including uniform definition of terms and basic principles. The initial results of these studies have been published, yet there has been no change in European legislation.

VI. Directive-conformable interpretation of national law

4/96 Due to the fact that the texts of directives give rise to many questions of interpretation, it is difficult to assess whether specific national implementation of a directive meets the directive's requirements. The path which national courts should choose in cases of uncertainty regarding the interpretation of a directive's stipulations is the preliminary reference procedure of the CJEU (art. 267 TFEU – see no. 4/49 above).

4/97 Once the national judge has established the exact content of a directive's stipulations that is relevant to the case at hand, he or she must assess whether the national implementation of the directive's stipulations was carried out correctly. If the stipulation could have been interpreted in several possible ways within the context of national interpretation principles, the judge is obliged to choose the interpretation that most closely conforms to the directive. It is only if domestic implementation is so unrelated to the specifications of the directive that the national provision cannot be interpreted as corresponding to the directive that the Member State has violated its duty of implementation (see no. 4/60 et seq., above). To illustrate this please study the following case.

CJEU 14.5.1998, C-364/96, Verein für Konsumenteninformation v. Österreichische Kreditversicherungs AG, ECLI:EU:C:1998:226.

The insolvency of the Karthago-Reisen GmbH tour operator resulted in 80 customers having to pay for their hotel in Greece directly, a payment that was originally included in their contract with Karthago-Reisen. Following their return to Austria, the concerned travellers requested the Austrian Verein für Konsumenteninformation (Austrian Association for Consumer Information) to bring an action against the insurer of Karthago-Reisen. The district court for Commercial Matters in Vienna submitted the question of how to interpret art. 7 of the Package

Travel Directive to the CJEU. According to art. 7 of the Directive, the tour operator (by means of concluding an adequate insurance contract) must prove that, in the case of its inability to pay or its insolvency, the reimbursement of sums paid by the package travellers as well as the return journey of the package travellers are secured. The Austrian implementation of art. 7 of the EU Package Travel Directive in the form of a regulation only envisaged this duty to secure the reimbursement and the return journey of package travellers in a case where the respective services have been paid for but not rendered. The travellers had, however, made full use of the Greek hotel. The CJEU interpreted art. 7 of the Directive within the context of the preliminary reference procedure (art. 267 TFEU).

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In its judgment, the CJEU held that the factual circumstance of a double payment was envisaged by the insolvency assurance required by the Directive. Therefore, the travellers should also have made a claim against the insurer for the »reimbursement of the paid sums« by reason of the implementation of the Directive; the Austrian implementation of the Directive was insufficient and Austrian law was accordingly required to be supplemented to cover cases where services had actually been rendered to travellers but had yet to be paid on-site. As a result, the Austrian travellers were conceded a claim against the insurer. The reimbursement, however, only extended to the price paid to the travel agency. The difference between the price paid to the travel agency and the on-site prices paid to the local vendor had to be borne by the travellers.

What are the advantages of an approximation of laws achieved by means of directives?

What is the extent of unification of EU law achieved by directives? Compare this to the unifying effect of regulations.

According to the interpretation by the CJEU in the decision »Verein für Konsumenteninformation«, to what extent does Austrian implementation not correspond to the specifications demanded by the Package Travel Directive?

What are the consequences of the incorrect Austrian implementation of the Package Travel Directive for the customers of Karthago-Reisen? Can they (via legal action taken by the Verein für Konsumenteninformation) reclaim the sums paid from the tour operator's insurance (in other

? words, do the incorrectly implemented directives have horizontal direct effect)? Which role does the so-called »directive-conformable interpretation« of the Austrian implementation measure play in this case?

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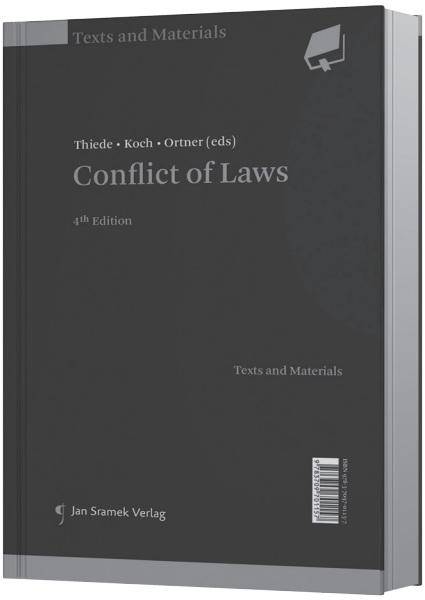

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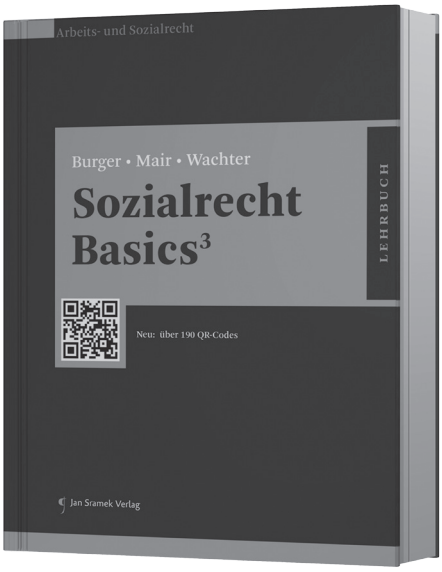

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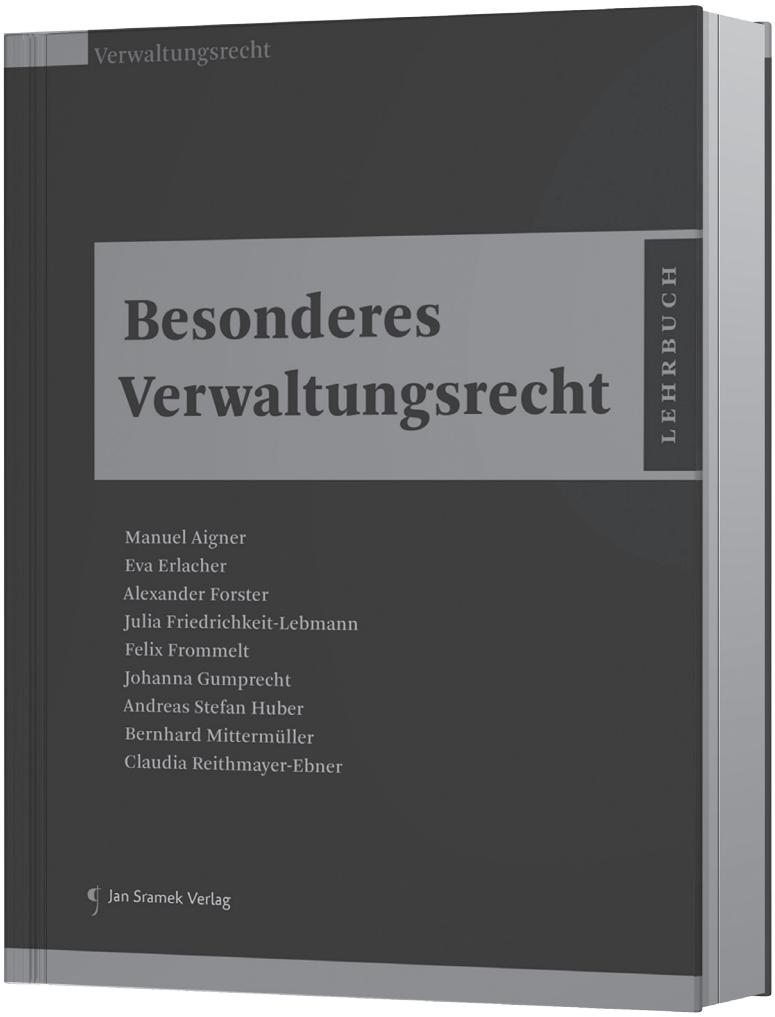

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